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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 138

Z. M. McCARROLL, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS, APPELLANT,

vs.

DIXIE GREYHOUND LINES, INC.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED JUNE 26, 1939.

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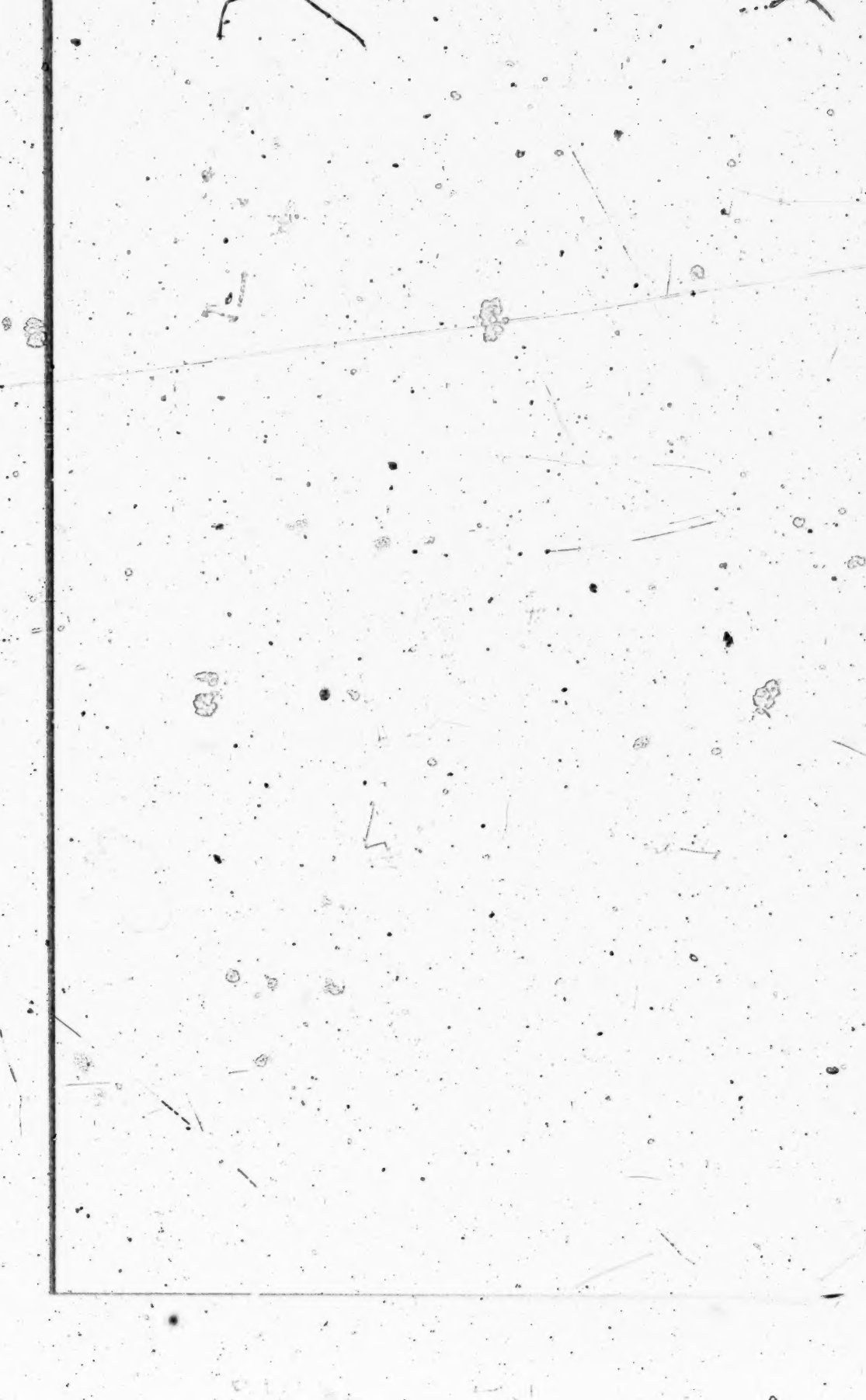

[fol. a] Captions omitted.

[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

No. 2655

DIXIE GREYHOUND LINES, INC.,

vs.

EARL R. WISEMAN, Commissioner of Revenues of the State of Arkansas

BILL OF COMPLAINT—Filed Oct. 31, 1934

To the Judge of the District Court of the United States for the Eastern District of Arkansas:

Dixie Greyhound Lines, Inc., a corporation duly created and existing under the laws of the State of Delaware, with its principal office at Memphis, in the State of Tennessee, brings this its bill against Earl R. Wiseman, as Commissioner of Revenues of the State of Arkansas, a resident and citizen of the State of Arkansas, and complains and says:

I

The ground upon which the jurisdiction of this Court depends is diversity of citizenship between the parties hereto; and the amount in controversy herein exceeds Three Thousand ($3,000.00) Dollars, exclusive of interest and costs. The plaintiff, Dixie Greyhound Lines, Inc., is a corporation duly created and existing under the laws of the State of Delaware, and is a citizen of the State of Delaware. The defendant, Earl R. Wiseman, is a resident and citizen [fol. 2] of the State of Arkansas. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

A further ground upon which the jurisdiction of this Court depends is that this suit is one of a civil nature in equity arising under the Constitution of the United States, to-wit, under Article 1, Section 8, Clause 3 thereof, commonly known as the "Commerce Clause," and under the

provision of the Fourteenth Amendment thereto, commonly known as the "Due Process Clause."

II

The plaintiff, Dixie Greyhound Lines, Inc., (whose corporate name was formerly "Central Greyhound Corporation") is a corporation organized for the purpose of operating as, and carrying on the business of a carrier of passengers by motor vehicle, and is engaged in the operation in various states of lines for the transportation of passengers through the agency of motor buses; and in aid of such purpose and business the plaintiff owns equipment of appropriate character, adequate to the giving of proper service, and also owns and holds numerous certificates of convenience and necessity issued or granted by the public service commissions of various states, authorizing plaintiff's said operations. Plaintiff is a public utility, and as such is subject to regulation and supervision [bb] the various public service commissions of the states in which it operates, in the same manner as other utilities, and is bound to furnish adequate service to the public over the routes upon which it regularly operates.

Pursuant to certificates of convenience and necessity granted it by the respective public service commissions of the states hereinafter mentioned, this plaintiff operates motor bus transportation for the carrying of passengers, baggage and light express, in both directions, over and upon the following interstate routes, among others:

(1) Between Memphis, Tennessee, and St. Louis, Missouri; traversing the streets and highways of the City of Memphis and State of Tennessee, a distance of 3 miles, that highway in the State of Arkansas known as "United States Highway No. 61" from the Tennessee-Arkansas State Line at Memphis, to the Arkansas-Missouri State Line, a further distance of 77 miles, and the aforesaid United States Highway No. 61 from the Arkansas-Missouri State Line through the State of Missouri to the City of St. Louis, Missouri, a further distance of 270 miles. Over all of this interstate route the plaintiff now operates three schedules daily in each direction.

[fol. 3] (2) Between Memphis, Tennessee, and Blytheville, Arkansas; traversing the streets and highways of the City

of Memphis and State of Tennessee, a distance of 3 miles, and that highway in the State of Arkansas known as "United States Highway No. 61" from the Tennessee-Arkansas State Line at Memphis to the City of Blytheville, Arkansas, a further distance of 77 Miles. Over this interstate route the plaintiff now operates one schedule daily in each direction.

(3) Between Memphis, Tennessee, and Jonesboro, Arkansas; traversing the streets and highways of the City of Memphis and State of Tennessee, a distance of 3 miles, that highway in the State of Arkansas known as "United States Highway No. 61" from the Tennessee-Arkansas State Line at Memphis to the town of Turrell, Arkansas, and that highway known as "United States Highway No. 63" from the town of Turrell, Arkansas, to the City of Jonesboro, Arkansas, a further distance of 72 miles. Over this interstate route the plaintiff now operates two schedules daily in both directions.

That upon each of the routes aforesaid, plaintiff is engaged in furnishing interstate transportation, and is engaged in interstate commerce in the transportation of passengers as aforesaid.

III

That the motor vehicles or buses, utilized by plaintiff in such interstate transportation of passengers, baggage and express are propelled by gasoline, and that the plaintiff is a very large user of gasoline in its transportation operations, purchasing and consuming in such operations almost one million gallons per year. The cost of such gasoline and the taxes paid thereon constitute one of the principal elements in the total cost of furnishing transportation to the public; and that the furnishing of such transportation by plaintiff in a proper, reliable and economical manner necessitates the maintenance by the plaintiff of storage facilities capable of [accom-odating] large quantities of gasoline. Such facilities must be large enough to permit the purchase and storage of gasoline in carload or bargeload quantities, because purchase of fuel in such quantities results in very material economy, and correspondingly lowers final transportation costs to the public; and it is further necessary that such facilities be not more numerous than absolutely necessary, because of the expense of installation and main-

tenance, and the cost — acquiring or leasing sites for the location of such storage, all of which expense are a part of the final transportation costs. It is essential that such storage [fol. 4] facilities should be located at strategic points, both with reference to the routes traversed by the plaintiff's buses (so that the latter may at all times be assured of fuel of proper type and quantity), and with reference to transportation facilities whereby the large quantities of fuel purchased may be conveniently and economically procured and handled. It is particularly necessary that, wherever circumstances permit, such storage facilities be set up at points where water transportation is available, for the reason that cost of transportation is a very large proportion of the final cost of gasoline, and water transportation of gasoline is cheaper than by rail.

That any variation from proper operating practices, as above set forth, and particularly any attempt to purchase gasoline casually at retail along the routes traversed by buses on regular schedule, without proper regard to type and quality of fuel and without regular and careful service in filling adequately sized tanks on the buses themselves, has the effect of not only greatly increasing the cost of motive fuel and thus ultimately the cost of transportation to the public, but also adversely affects and greatly impedes the regularity, reliability and convenience of such transportation; for the reason that such casual purchase of fuel at retail gives rise to inevitable delays, results in increased road failures of buses because of improper quality and insufficient quantity of gasoline, and deprives the transportation of the benefit of a regular, careful and systematic supervision of fuel quality and quantity. The result of such increased expense and lack of regularity of service is to increase the cost of the transportation, to affect the passengers with such increased cost and with the inconvenience, annoyance and loss due to incidental delays and trouble, and to cause the plaintiff itself great damage because of the loss of business and of good will resulting from such inferior service, and because of the risk of loss of its certificates of convenience and necessity for failure to operate upon same in a proper and convenient manner. That the casual filling of gasoline tanks of motor buses, along and upon the routes traversed, constitutes a risk to passengers therein, because of the inherent danger of handling gasoline and the hazard of fires caused by static electricity; and

for that reason the plaintiff is accustomed to fill the tanks of its buses only at times and places when the passengers have not entered the bus, or have temporarily left it. That the necessity for casual purchase of gasoline and the placing of same in the tanks of plaintiff's buses at road side stops, will subject passengers on such buses to the hazard of fire, as above stated. That unless the plaintiff is free to [fol. 5] purchase, store, and place in its buses for use, gasoline in such quantities and at such times and places as proper motor bus operation dictates, the effect will be definitely to increase the cost and hazard, and decrease the convenience, speed and quality, of the interstate transportation furnished by the plaintiff upon the routes operated by it, specifically including the particular routes above mentioned.

That with particular reference to its operations upon the routes aforesaid, [involving] in part operations into and within the State of Arkansas, Dixie Greyhound Lines, Inc., maintains gasoline storage facilities at Memphis, Tennessee, and at Caruthersville and St. Louis, Missouri. That each and all of said cities offer water transportation, and are properly located with respect to the routes traversed by the buses of the plaintiff. That no point within the State of Arkansas, on any of the routes traversed in that State by the plaintiff, offers any of the said advantages; and that the creation of storage facilities at any point on any of those routes within the State of Arkansas would constitute merely an expensive and useless duplication of existing and adequate facilities.

That, in its operations over the interstate routes hereinbefore mentioned, Dixie Greyhound Lines, Inc., is accustomed to use bus equipment of a type and size adequate to the convenience of the public offering [itself] for transportation upon those routes. The motor buses operated on the two interstate routes between Memphis, Tennessee, and Blytheville, and Jonesboro, Arkansas, are regularly equipped with gasoline tanks or containers having an aggregate capacity of fifty (50) gallons. These motor buses average about seven miles to each gallon of gasoline consumed. Dixie Greyhound Lines, Inc., is accustomed to fill the tanks of these buses at Memphis, Tennessee, with a quantity of gasoline amply sufficient to transport the bus and its passengers from Memphis to Blytheville, or Jonesboro, Arkansas, and back again to Memphis, with proper reserve capacity against unforeseen contingencies. Those motor buses operated by

Dixie Greyhound Lines, Inc., upon its said route between Memphis, Tennessee, and St. Louis, Missouri, are of a larger type, and are equipped with tanks having a capacity of ninety (90) gallons or more. Such buses average about five miles for each gallon of gasoline consumed. Dixie Greyhound Lines, Inc., is accustomed to fill the tanks of such Memphis-St. Louis buses, when northbound, at Memphis, and when such bus reaches Caruthersville, Missouri, the tanks are there replenished for the run to St. Louis. The southbound St. Louis-Memphis buses are filled at St. Louis, [fol. 6] and are also replenished at Caruthersville, Missouri, for the remaining run to Memphis.

That Dixie Greyhound Lines, Inc., pays to the State of Tennessee a tax of seven ($.07) cents per gallon and an inspection fee of four ($.004) mills per gallon on all gasoline placed by it in storage in its facilities at Memphis, Tennessee, whether such gasoline is used within the State of Tennessee or not; and Dixie Greyhound Lines, Inc., also pays to the State of Missouri a tax of three ($.03) cents per gallon on all gasoline placed by it in storage in its facilities at Caruthersville and St. Louis, Missouri or not; and the plaintiff avers and charges that every gallon of gasoline customarily brought into the State of Arkansas in the buses of Dixie Greyhound Lines, Inc., has been taxed by, and the tax paid to, the States of Tennessee or Missouri.

That the distance from Memphis, Tennessee, to Blytheville, Arkansas, is eighty (80) miles; that the distance from Memphis, Tennessee, to Jonesboro, Arkansas, is seventy-five (75) miles; and that the distance from Memphis, Tennessee, to Caruthersville, Missouri, is one hundred five (105) miles.

IV

That on the 2nd day of March, 1933, there was passed by the General Assembly of the State of Arkansas an Act, being Act 67 of the General Assembly of 1933, and entitled "A bill for an Act to be entitled: 'An Act to better enforce the Gasoline Tax and for other purposes,' " which said Act is in terms as follows:

"Be it enacted by the General Assembly of the State of Arkansas: Be it enacted by the People of the State of Arkansas:

Section 1: On and after the passage of this Act it shall be a violation of the law for any person, copartnership, or company to drive or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tanks of said trucks to be used as motor fuel in said truck or motor vehicle until the State Tax thereon has been paid.

Section 2: Any person, co-partnership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred ($100.00) dollars. Each load carried into the State shall constitute a separate offense.

Section 3: All laws and parts of laws in conflict herewith are hereby repealed. It is ascertained that this Act is neces- [fol. 7] sary to better enforce the gasoline collection laws and said Act being necessary for the [immediate] preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage."

That on the 26th day of January, 1934, there was passed by the General Assembly of the State of Arkansas an Act, being Act 11 of the Special Session of the General Assembly of 1934, and entitled, "A Bill for an Act to be entitled: 'An Act to refund Highway and Toll Bridge Obligations; to provide for the Payment and/or Funding of Certificates issued in aid of Municipal Improvement Districts; to provide for the Funding and/or Payment of Claims against the State Highway Commission, and for other Purposes,' " of which said Act those portions material to this cause are as follows:

"Section 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

'(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State.' "

"Section 25. Section 2 of Act No. 63 of the General Assembly approved February 25, 1931, is amended to read as follows:

'Section 2. The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, when used in this State; double taxation is not intended. Motor vehicle fuel manufactured, produced or compounded in or imported into this State and subsequently sold for exportation, is not taxable.

The tax herein levied is to be collected at the source in this State of the manufacturer or wholesaler when sales of any motor vehicle fuels are made, and when not sold in this State, then when first brought into this State for use herein. Provided that notwithstanding any provision or provisions contained in this Act to the Contrary, no person, firm or corporation who manufacturers motor vehicle fuel in this State from crude oil and its deriviti-es shall be required to pay or collect the tax imposed by this Act on any such motor vehicle fuel that said person, firm or corporation sells and ships to the purchaser in a railway tank car. This pro-[fol. 8] vision, however, shall not relieve any person, firm or corporation from making reports to the Commissioner of Revenues showing the amount of motor vehicle fuel sold in railway tank cars, and the tax upon such motor vehicle fuel so shipped in railway tank cars shall be collected and paid by the person, firm or corporation which purchases the motor vehicle fuel which is shipped in a railway tank car.' ''

''Section 27. Nothing in this Act or in any similar law on the subject shall be construed as intending to levy any tax on motor vehicle fuel that the State has no power to tax.''

''Section 28. The tax of six and one-half cents per gallon herein provided for is levied and shall be collected, under such rules as may be promulgated by the Commissioner [or] Revenues for ascertaining the quantity of such motor vehicle fuel, on all motor vehicle fuel purchased in other states and used in this State in propelling motor vehicles on the public highways moving in interstate or foreign commerce in all instances where such tax is not a burden on such interstate or foreign commerce and such tax may be lawfully collected by this State.''

That pursuant to the Acts of the State of Arkansas, aforesaid, the defendant, Earl R. Wiseman, in his capacity as Commissioner of Revenues of the State of Arkansas, on the 12th day of February 1934, promulgated certain Regula-

tions known as Motor Vehicle Fuel Regulation No. 2, containing among other provisions the following:

"The following Rules and Regulations are hereby prescribed under the provisions of Act 65 and 146 of the Acts of 1929, Act 63 of the Acts of 1931 and Act 11—1934 of the Special Session in January 1934.

Motor Vehicle Fuel Tax Imposed

A privilege or excise tax of six and one-half (6½) cents per gallon is imposed on each gallon of Motor Vehicle Fuel received, sold or used in this State or purchased for sale or use in this State. Act 11, 1934."

* * * * * * *

"Motor Vehicle Fuel in excess of 20 gallons brought into this State in the fuel tank of a motor vehicle or in auxiliary tanks or containers is unlawful and any person, firm or corporation violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined [fol. 9] in any sum not exceeding one hundred ($100.00) dollars. Each load brought into the State shall [constitute] a separate offense. Act 67 of 1933."

* * * * * * *

"The tax of six and one-half (6½) cents per gallon herein provided for, shall be collected, under such rules as may be promulgated by the Commissioner of Revenues for ascertaining the quantity of such motor vehicle fuel, on all motor vehicle fuel purchased in other vehicles on the public highways moving interstate or foreign commerce in all instances where such tax is not a burden on such interstate or foreign commerce and such tax may be lawfully collected by this State."

That the defendant, Earl R. Wiseman, is the duly appointed and acting Commissioner [or] Revenues of the State of Arkansas, and as such is charged with the enforcement of these Acts of the State of Arkansas and Regulations aforesaid.

V

That the plaintiff has been informed by the defendant, and believes, and therefore avers and charges, that the

defendant Earl R. Wiseman, as Commissioner of Revenues, pursuant to what he conceives to be the duty cast upon him by such Acts and Regulations aforesaid, will proceed to bring about the arrest of the plaintiff, or its agents, in the event that, and so often as, such plaintiff shall enter the State of Arkansas with any one or more of its motor buses, on their regular interstate journeys, having then in the tanks of such buses gasoline in quantity exceeding twenty (20) gallons; and that said defendant will attempt to impose upon the plaintiff in each case the various penalties in said Acts provided, unless the plaintiff shall first pay to the State of Arkansas the regular Arkansas tax of 6½ cents per gallon upon the privilege of the use of such gasoline in interstate commerce.

VI

That it is not possible for this plaintiff to operate its motor buses, upon their regular interstate routes and trips into and within the State of Arkansas, by the use of that limited quantity of twenty gallons of gasoline which may without interference or molestation be brought into the State of Arkansas under the said Acts and Regulations, without incurring grave risk that such buses will run out of fuel while upon such routes, to the great delay and inconvenience of interstate passengers, and great incidental loss to the plaintiff.

[fol. 10]

VII

That if the defendant shall attempt to enforce against the plaintiff the Acts and Regulations above mentioned, this plaintiff will thereby be placed in the position of being compelled (1) to obey the unlawful restrictions of those Acts and Regulations, limiting the contents of its fuel tanks to twenty gallons, and thereby subject its interstate passengers to the inconvenience of road failures and stoppages and the delays and loss incidental thereto, or (2) to augment the said twenty gallons by the purchase of additional gasoline at retail when and as needed, at casual points within the States of Tennessee, Missouri, or Arkansas, at increased cost due to the additional tax in the case of purchases in Arkansas, and in every case with incidental delay and hazard, or (3) to set up at great expense unneeded and otherwise useless facilities for storage of gasoline in Arkan-

sas, or (4) to pay to the gasoline tax collecting authorities of the State of Arkansas an excise or privilege tax of 6½ cents on every gallon of gasoline, in excess of twenty gallons, brought into that State by plaintiff in the tanks of its buses for immediate consumption in its interstate transportation of passengers.

VIII

That plaintiff is advised and believes, and therefore charges, that the said excise or privilege tax of 6½ cents per gallon, purported to be imposed upon gasoline used in propelling vehicles in interstate commerce, under Section 28 of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, is not in truth and fact applicable to or collectible from the plaintiff, and that the attempted collection of such tax from this plaintiff would be oppressive and wrongful; for the reason that such excise or privilege tax, if collected from plaintiff as threatened, upon gasoline already validly taxed by other States and carried into the State of Arkansas in the tanks of buses then actually operating in interstate transportation, would constitute a burden upon interstate transportation and commerce by directly and materially increasing the cost and restricting the freedom, convenience and safety thereof. Plaintiff avers that the said Act 11 specifically disclaims any intention or purpose to have application, in any case wherein such application would give rise to any burden upon interstate commerce; and further avers and charges that if said Act 11 does have application to this plaintiff, in the course of those interstate operations aforesaid, the said act 11 is contrary to and violative of Article 1, Section 8, Clause 3, of the Constitu-
[fol. 11] tion of the United States, commonly known as the "Commerce Clause," and that provision of the Fourteenth Amendment to such constitution commonly known as the "Due Process Clause," and is consequently wholly void; and that any regulations pursuant thereto are also void.

That plaintiff is further advised and believes, and therefore charges that the said Act 67 of the General Assembly of Arkansas of 1933, insofar as it purports to prohibit and impose a penalty upon the bringing into the State of Arkansas of gasoline in excess of twenty gallons, contained in the tanks of vehicles presently engaged in interstate transportation, is contrary to and violative of Article 1, Section 8, Clause 3 of the Constitution of the United States,

commonly known as the "Commerce Clause," and of that provision of the Fourteenth Amendment to said Constitution commonly known as the "Due Process Clause," and is to that extent wholly void; for the reason that such limitation upon the fuel to be so carried is a burden upon such interstate commerce by reason of the additional expense, inconvenience and hazard directly placed thereon.

IX

That the wrongful attempts of the defendant to enforce such Acts against this plaintiff will occasion the plaintiff irreparable injury, and will involve the plaintiff in a multiplicity of suits; in that, if the plaintiff shall attempt to operate within the said twenty gallon limit, it will be unable properly and conveniently to operate its lines and to make connections with other carriers, and will suffer damage to its business, great in amount but incapable of exact determination; whereas, should it fail to comply with such limitation, it will be subjected to constant arrests and will be fined, and will be forced to litigate a large number of such criminal causes, and in addition will suffer damages to its business by reason of such arrests.

X

That the plaintiff is without adequate remedy at law in the premises, and only in a suit of this nature, and by the injunctive processes of this Court can it be fully protected in the enjoyment of its property and rights; and that the granting of the injunctive process as hereinafter prayed for will prevent the multiplicity of suits and prosecutions, and all questions here involved can be adequately determined.

In Consideration Whereof, The Plaintiff Prays:

1. That, upon the hearing, this Court declare that Act 67 of the General Assembly of Arkansas of 1933 is contrary to [fol. 12] and violative of Article 1, Section 8, Clause 3, and of the Fourteenth Amendment, of the Constitution of the United States and is void insofar as such Act 67 purports to prohibit the bringing into the State of Arkansas, in fuel tanks of vehicles then operating in interstate transportation, of gasoline in excess of twenty gallons; and that the Court further declare that Act 11 of the Special Session of the General Assembly of Arkansas of 1934, insofar as it

purports to impose or require the payment of an excise or privilege tax at the rate of 6½ cents per gallon upon all gasoline in excess of twenty gallons brought into the State of Arkansas in the fuel tanks of plaintiff's motor vehicles then operating in interstate transportation, is inapplicable to this plaintiff, and the said tax is not properly or legally collectible under such Act from such plaintiff, in the course of business of interstate transportation as carried on by the plaintiff; and further, that if and insofar as the said Act 11 does or shall purport to levy or impose such a tax upon gasoline in excess of twenty gallons thus brought into the State of Arkansas in the fuel tanks of motor vehicles of the plaintiff then engaged in operating in interstate transportation, the said Act 11 is in conflict with Article 1, Section 8, Clause 3, and of the Fourteenth Amendment, of the Constitution of the United States, and is void.

2. That, upon the hearing, the defendant, Earl R. Wiseman, as Commissioner of Revenues of the State of Arkansas, be permanently enjoined from in any way or manner enforcing or attempting to enforce against this plaintiff any provision of said Act 67 of the General Assembly of Arkansas of 1933, or any regulation pursuant thereto; and that said defendant, Earl R. Wiseman, as Commissioner of Revenues of the State of Arkansas, be further permanently enjoined against in any way or manner enforcing or attempting to enforce against this plaintiff any provision or provisions of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, which may purport to levy or require payment by this plaintiff of a license or excise tax at the rate of 6½ cents a gallon or otherwise upon any gasoline, in excess of twenty gallons, brought into the State of Arkansas in motor vehicles of the plaintiff then operating in interstate transportation.

3. That the plaintiff have such other, further and general relief to which it may be entitled in the premises.

Dated this 25th day of April, 1934.

Chandler, Shepherd, Owen & Heiskell, Solicitors for Plaintiff.

[fol. 13] *Duly sworn to by Frederick Smith. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO ORIGINAL BILL OF COMPLAINT—Filed Jan. 2, 1935

Comes Plaintiff, Dixie Greyhound Lines, Inc., and leave of court being first had and obtained, amends the original bill of complaint filed by it herein, in the following respects:

1. By striking out that paragraph beginning near the bottom of page 5 of such original complaint with the words "That in its operation over the interstate routes hereinbefore mentioned" and concluding on page 6 of such original complaint, and substituting in lieu thereof the following paragraph:

"That, in its operation over the interstate routes hereinbefore mentioned, Dixie Greyhound Lines, Inc., is accustomed to use bus equipment of a size and type adequate to the convenience of the public, offering itself for transportation upon those routes. The motor buses operated upon those interstate routes between Memphis, Tennessee, and Jonesboro and Blytheville, Arkansas, and Caruthersville, Missouri, will travel an average of approximately seven miles for each gallon of gasoline consumed. Dixie Greyhound Lines, Inc., is accustomed to place in the tanks of its Memphis to Jonesboro and Memphis to Blytheville buses a sufficient quantity of gasoline to transport the bus to its destination and return; and is accustomed to place in the tank of its Memphis to Caruthersville bus a sufficient quantity of gasoline to transport the bus to Caruthersville, where a supply can be added from storage at that point sufficient to return the bus to Memphis. Those buses operated upon the interstate route between Memphis, Tennessee, and St. Louis, Missouri, will average approximately five miles for each gallon of gasoline consumed. Dixie Greyhound Lines, Inc., is accustomed to place in the tanks of its buses, northbound from Memphis to St. Louis, a quantity of gasoline sufficient to transport the bus to Caruthersville, Missouri, where the tanks can be supplied from the run to St. Louis. The tanks of the southbound St. Louis to Memphis buses are supplied at St. Louis with fuel in amount sufficient to transport such buses to Caruthersville, Missouri, where an

[fol. 15] amount of gasoline may be added sufficient to transport the bus to Memphis."

2. By correcting the following omission and error with respect to schedules operated by plaintiff, and distance between points, in the original complaint:

(a) In addition to those schedules from Memphis to St. Louis operated on United States Highway No. 61, the plaintiff also operates one schedule daily in each direction on said Highway between Memphis, Tennessee and Caruthersville, Missouri.

(b) The distance between the Tennessee-Arkansas State Line and Blytheville, Arkansas, is 71.4 miles, and not 77 miles.

Dixie Greyhound Lines, Inc., By Chandler, Shepherd, Owen & Heiskell, Solicitors.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS AND ANSWER OF DEFENDANT—Filed July 12, 1935

MOTION TO DISMISS

Comes now Earl R. Wiseman, Commissioner of Revenues of the State of Arkansas, the defendant in the above entitled action, and files this motion, and hereby moves the court to dismiss the above entitled action, and to dismiss the plaintiff's bill of complaint on file in said action upon the following grounds:

I

That the facts set forth in said bill of complaint are not sufficient to constitute a cause of action against this defendant.

II

That the plaintiff has a full, complete, and adequate remedy at law to recover the relief herein sought.

ANSWER

Without waiving any rights inuring to defendant under, and by virtue of, the foregoing motion to dismiss, but re-

serving all of the said rights thereunder, defendant for his answer herein states:

I

Defendant admits that the plaintiff is a corporation duly created and existing under the laws of the State of Delaware [fol. 16] with its principal office at Memphis in the State of Tennessee, and admits that he is a resident and citizen of the State of Arkansas.

II

Admits that a diversity of citizenship exists between the parties hereto; that the amount in controversy herein exceeds $3,000.00 inclusive of interest and costs.

Admits that this a suit of a civil nature in equity arising under Article 1, Section 8, Clause 3, of the Constitution of the United States, commonly known as "The Commerce Clause" and under the provisions of the Fourteenth Amendment thereto, commonly known as "The Due Process Clause."

III

Admits that the plaintiff is a corporation organized for the purpose of operating as, and carrying on the business of, a carrier of passengers by motor vehicles, and is engaged in the operation, in various states, of lines for the transportation of passengers through the agency of motor buses, and that in aid of such purpose and business the plaintiff owns proper automotive equipment, and certificates of convenience and necessity issued by the various states through which it operates.

Admits that plaintiff operates its motor buses between Memphis, Tennessee and St. Louis, Missouri over United States Highway 61 through, upon, and over said highway within the State of Arkansas from the Tennessee-Arkansas state line to the Missouri state line.

Admits that plaintiff operates its motor buses interstate between Memphis, Tennessee and Blytheville, Arkansas over United States Highway 61 from the Tennessee-Arkansas state line at Memphis, to the City of Blytheville, Arkansas.

Admits that the plaintiff operates its automobile buses interstate between Memphis, Tennessee and Jonesboro, Arkansas over United States Highway 61 from the Tennessee-

Arkansas state line at Memphis to the town of Turrell, Arkansas; and thence over United States Highway 63 from the town of Turrell to the City of Jonesboro, Arkansas.

Admits that upon each of the routes aforesaid plaintiff is engaged in furnishing interstate transportation and is engaged in interstate commerce.

IV

Admits that the motor vehicles used by plaintiff in its interstate transportation of passengers are propelled by [fol. 17] gasoline, but not having sufficient information upon which to base a belief as to the amount of gasoline used by plaintiff, defendant denies that plaintiff consumes almost 1,000,000 gallons of gasoline in one year. Defendant states that it has not sufficient information upon which to base a relief as to the allegation with reference to the cost of gasoline and taxes paid thereon by the plaintiff or whether it is necessary for plaintiff to maintain large storage facilities, and therefore denies same. Defendant denies that it is necessary for plaintiff to purchase gasoline in carload or in barge load lots, and denies that such purchases result in material economy and lower transportation cost to the public; denies that such purchases will save expense in the installation and maintenance of storage tanks and leasing sites for location of such storage; denies that it is necessary that such storage be located only at points where water transportation is available; denies that water transportation of gasoline is cheaper than by rail, and denies that the storage of gasoline by plaintiff is necessary to assure it at all times of fuel of proper type and quantity.

Denies that the purchase of gasoline at retail along the routes traversed by its buses will have the effect of increasing the cost of such gasoline, and increase the cost of transportation to the public; denies that such purchases will impede the regularity the reliability, and [conv--ience] of its transportation service, and that such purchases of gasoline, at retail, would give rise to inevitable delays, road failures, and prevent a regular, careful, and systematic supervision of the fuel so purchased; denies that such purchases would increase the cost of transportation and subject its passengers to inconvenience, annoyance, delays, and trouble, and denies that it would cause the plaintiff any damage or loss of business or the risk of losing any of its certificates of convenience and necessity.

Denies that such purchase of gasoline at retail, along the route of its buses, would constitute a risk to passengers thereon because of the inherent danger caused by static electricity or otherwise, and denies that it will subject its passengers to a fire hazard; denies that such purchase will increase the cost of transportation service and decrease the convenience, speed, and quality of the transportation service now operated by the plaintiff over the routes above mentioned.

Denies that no point within the State of Arkansas is unable to furnish plaintiff any storage facilities such as [fol. 18] that used by plaintiff at Memphis, Tennessee, and Caruthersville and St. Louis, Missouri, and denies that the creation of storage facilities at any point on its route within the State of Arkansas would constitute an expensive and useless duplicate of existing facilities.

Defendant admits that in its operation over the interstate routes hereinbefore mentioned, the plaintiff, Dixie Greyhound Lines, Incorporated, is accustomed to use bus equipment of a size and type adequate to the convenience of the public offering itself for transportation upon its routes. Defendant states that he does not have sufficient information upon which to base a belief, and, therefore, denies that the motor buses operated upon the routes between Memphis, Tennessee and Jonesboro and Blytheville, Arkansas, and Caruthersville, Missouri, will travel an average of approximately seven miles for each gallon of gasoline consumed. Defendant further states that he has not sufficient information upon which to base a belief, and therefor- denies that the plaintiff is accustomed to place in the tanks of its Memphis to Jonesboro and Memphis to Blytheville buses a sufficient quantity of gasoline to transport the buses to those [to those] destinations and return. And denies that it is accustomed to place in the tank of its Memphis to Caruthersville bus a sufficient quantity of gasoline to transport the bus to Caruthersville, where a supply can be added sufficient to return the bus to Memphis. Defendant further states that he has not sufficient information upon which to base a belief, and therefore denies that those buses operated between Memphis, Tennessee and St. Louis, Missouri will average five miles for each gallon of gasoline consumed; and denies that the plaintiff is accustomed to place in the tanks of its buses, north bound from Memphis to St. Louis, a quantity of gasoline sufficient to transport the bus from

Caruthersville, Missouri, where the tanks can be supplied for the run to St. Louis, and denies that the tanks of the south bound St. Louis to Memphis buses are supplied at Caruthersville, Missouri, with a sufficient amount of gasoline to transport the bus to Memphis.

V

Defendant further states that the buses operated by the plaintiff between Memphis, Tennessee, and Blytheville and Jonesboro, Arkansas, are equipped with tanks having a capacity of fifty (50) gallons, and that such tanks are filled to capacity each time said bus begins its run, and defendant states that the amount of unused gasoline in said tank exceeds the amount of twenty (20) gallons and is capable [fol. 19] of being used as a motor fuel, and that the Arkansas State Tax has not been paid thereon, and that under the provisions of the statutes herein involved is subject to tax by the State of Arkansas.

Defendant further states that the buses operated by the plaintiff between Memphis, Tennessee, and St. Louis, Missouri are equipped with tanks having a capacity of ninety (90) gallons, and that such tanks are filled to capacity each time said bus begins its run, and defendant states that the amount of unused gasoline in said tank exceeds the amount of twenty (20) gallons and is capable of being used as a motor fuel, and that the Arkansas State tax has not been paid thereon, and that under the provisions of the statutes herein involved is subject to tax by the State of Arkansas.

VI

Defendant denies that plaintiff pays to the State of Tennessee a tax of seven cents per gallon and an inspection fee of four mills per gallon on all gasoline placed by it in its storage tanks in Memphis, Tennessee; and denies that it pays to the State of Missouri a tax of three cents per gallon on all gasoline placed by it in storage at Caruthersville and St. Louis, Missouri; and denies that every gallon of gasoline brought into the State of Arkansas by the plaintiff in its buses has been taxed by, and the tax paid to, the state of Tennessee or Missouri.

Admits that the distance from the Tennessee-Arkansas state line to Blytheville, Arkansas is 71.4 miles and the distance from Memphis, Tennessee, to Jonesboro, Arkansas is

seventy-five (75) miles and the distance from Memphis, Tennessee, to Caruthersville, Missouri is one hundred and five (105) miles.

VII.

Admits that on the 2nd day of March, 1933, the General Assembly of the States of Arkansas enacted Act 67, entitled "An Act to Better Enforce the Gasoline Tax and for Other Purposes", and that said Act is correctly copied at length in the complaint of plaintiff on page seven thereof.

Defendant states that on February 12, 1934, the General Assembly of the State of Arkansas enacted Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, entitled "An Act to Refund Highway and Toll Bridge Obligations of the State and Road Improvement District Obligations; to Provide for the Payment and/or Funding of Certificates Issued in Aid of Mu- [fol. 20] nicipal Improvement Districts; to Provide for the Funding and/or payment of Claims Against the State Highway Commission and for Other Purposes" and admits that plaintiff has [correctly] copies Sections 22, 25, 27, and 28 of said Act as shown on page eight of its complaint.

Defendant admits that, in his capacity of Commis*mis*-sioner of Revenues of the State of Arkansas he promulgated certain regulations known as, "Motor Vehicle Fuel Regulation No. 2" and that the provisions of said regulations have been correctly copied as part of the complaint in this cause on page nine of the complaint.

Defendant admits that he is the duly appointed and acting Commissioner of Revenues of the State of Arkansas and as such is charged with the enforcement of the Acts and regulations above set forth.

VIII

Defendant admits that pursuant to the provisions of Act 67 of 1933 and Act 11 of the Special Session of 1934 he will proceed to bring about the arrest of plaintiff, and his agents, so often as they, and each of them, enter the State of Arkansas in buses having, in their tanks, gasoline in a quantity exceeding twenty gallons upon which no tax has been paid the State of Arkansas, and that he will attempt to impose upon plaintiff, and his agents, all the various penalties provided by said Acts; and unless and until plaintiff shall pay the tax upon said gasoline due the State of Arkansas by virtue of the provisions of the above mentioned Acts.

IX

Defendant denies that it is impossible for plaintiff to operate its motor buses upon their regular interstate and intrastate routes and trips into and within the State of Arkansas with twenty gallons of gasoline; but on the contrary states that such quantity is ample to operate its buses into, through, and out of the State of Arkansas, and that the enforcement of the provisions of the Acts herein attacked and the compliance therewith by the plaintiff will in no manner interfere with its business as an interstate carrier, and defendant states that if plaintiff elects to bring into the State, in the tanks of its buses, more gasoline than twenty gallons, it thereby becomes amenable to the provisions of the Acts in question, and as such is liable to the State of Arkansas for the tax and penalties prescribed by the statutes.

X

Defendant denies that the Act and regulations restricting the contents of the vehicle tanks of plaintiff's buses to [fol. 21] twenty gallons is an unlawful restriction, and that it will subject its interstate passengers to inconvenience, loss, and delay. Denies that if plaintiff augments the said permitted twenty gallons by the purchase of additional gasoline, within the State of Arkansas, it will result in a delay or create a hazard; and denies that the provisions of the Acts in question will necessitate the purchase of storage facilities in the State of Arkansas; and admits that plaintiff will be required to pay the State of Arkansas a privilege tax of six and one half (6½) cents per gallon on every gallon of gasoline in excess of twenty gallons brought into the State of Arkansas in the tanks of its motor vehicles.

XI

Defendants denies that the gasoline tax imposed by Act 67 of 1933, as amended, is not applicable to, or collectible from, the plaintiff; and denies that the attempted collection of such tax from plaintiff is oppressive and wrongful; denies that the collection of such tax from plaintiff would constitute a burden upon interstate transportation and commerce; denies that such tax would directly and materially increase the cost and restrict the freedom, convenience, and safety of such commerce.

Defendant specifically denies that the tax imposed by the statutes herein under attack are contrary to, and violat-e of, Article 1, Section 8, Clause 3, of the Constitution of the United States, commonly known as "the Commerce Clause" and that provision of the Fourteenth Amendment to the Constitution of the United States commonly known as "the due Process Clause"; and denies that said statutes are void; denies that the imposition of the tax levied by the statutes constitutes a burden upon interstate commerce by reason of additional expense, inconvenience, hazard or otherwise.

XII

Defendant denies that his attempts to enforce the Acts in question against the plaintiff are wrongful, and denies that his actions will occasion the plaintiff irreparable injury; denies that it will involve the plaintiff in a multiplicity of suits; denies that if said statutes in question be enforced against the plaintiff it will be unable to properly and [conveniently] operate its lines or that it will suffer damage to its business in any amount whatsoever.

XIII

Further answering, and by way of cross-complaint, this defendant states that Act 67 of 1933 was approved and be- [fols. 22-24] came effective on March 2, 1933. That said Act makes it unlawful for any person to drive, or cause to be driven, into the State of Arkansas an automobile or truck carrying over twenty gallons of gasoline in the tank of such vehicle to be used as motor fuel in said truck or vehicle until the State tax has been paid thereon.

Further answering, defendant states that Act 67 of 1933, and the pertinent provisions of Act 11 of 1934, set forth in the complaint of the plaintiff herein and herein attacked, are, in all respects, constitutional and valid, and do not in any manner whatsoever violate the provisions of "the Commerce Clause" or "the Due Process Clause" of the Constitution of the United States, but on the contrary are proper enactments for the protection, use, and benefit of the State of Arkansas, and the plaintiff is, in all respects, amenable to their provisions and liable for the tax therein imposed.

Further answering, defendant specifically denies that the statutes herein under attack are unconstitutional, and denies

that the plaintiff is entitled to injunctive relief, or any other relief, to prevent enforcement against them.

Wherefore, defendant asks that plaintiff take nothing by its complaint herein, and that same be dismissed; that upon a final hearing of this cause defendant have judgment against the plaintiff for all its costs herein expended and all other proper and equitable relief.

Louis Tarlowski, Solicitor for Defendant.

[File endorsement omitted.]

[fol. 25] In United States District Court

Order Substituting Z. M. McCarroll, Commissioner of Revenues, Etc., as Defendant in the Place of Earl Wiseman—Filed Jan. 6, 1938

It Is Ordered that Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, be and hereby is substituted as defendant herein in place of Earl R. Wiseman, without prejudice to the proceedings already had in this cause, and that this cause may be continued and maintained [fols. 26-35] against said Z. M. McCarroll as successor in office of said Earl R. Wiseman.

This 6th day of January, 1938.

Thomas C. Trimble, Jr., District Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Stipulation Relating to Application for Preliminary Injunction, Etc.—Filed Jan. 6, 1938

It is hereby stipulated by counsel for the respective parties in the above styled cause, as follows:

1. That the application for preliminary injunction, pursuant to the amendment to the original bill in the cause, is not being pressed by the plaintiff at this hearing, but that

said hearing is to be had with reference to permanent injunction only.

2. That the affidavits of E. W. Smith and Frederick Smith may be offered by either party in evidence in the trial of this cause, and that such affidavits shall be received in evidence in the same manner as though the affiants had testified personally in the cause to the matters in such affidavits set forth.

Chandler, Shepherd, Owen & Heiskell, Attorneys for Plaintiff, Louis Tarlowski, Attorney for Defendant.

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 31, 1938

[fol. 37] The Court makes the following findings of fact herein:

I

That it has jurisdiction of the parties herein and of the subject matter of this action.

II

That Plaintiff is a Delaware Corporation, doing business within the State of Arkansas as an intrastate and interstate common carrier of passengers, baggage, and light express; and Defendant, Z. M. McCarroll, is the duly appointed, qualified and acting Commissioner of Revenues of the State of Arkansas, and is the proper official of said State to collect the gasoline tax herein involved.

III

That Plaintiff herein, Dixie Greyhound Lines, Inc., is a common carrier of passengers by motor vehicle, operates a bus line from Memphis, Tennessee to Jonesboro, Arkansas over U. S. Highways 70, 61 and 63, and that the distance upon this route, within the State of Arkansas, is 70 miles.

IV

That the Plaintiff herein, Dixie Greyhound Lines, Inc., as a common carrier of passengers by motor vehicle, operates a bus line from Memphis, Tennessee to Saint Louis, Missouri over U. S. Highways 70 and 61, and that upon this route 77.9 miles are located within the State of Arkansas.

V

That Plaintiff herein, Dixie Greyhound Lines, Inc., as a common carrier of passengers by motor vehicle, operates a bus line from Memphis, Tennessee to Blytheville, Arkansas, over and upon U. S. Highways 70 and 61, and of which route 71.4 miles are located within the State of Arkansas.

VI

That the busses, operated by Plaintiff over and upon the above described routes, are propelled by gasoline motors, and average approximately five miles for each gallon of gasoline consumed; and that twenty gallons of gasoline will be sufficient for each of its busses, upon the above described routes, to traverse the State of Arkansas and its operations therein.

VII

That each of the busses of the Plaintiff operating into, through, and across the State of Arkansas carry within its [fol. 38] tanks a supply of gasoline in excess of twenty gallons, and that the Arkansas State Tax has not been, and is not being, paid thereon.

VIII

That, under Act 67 of the General Assembly of the State of Arkansas for the year 1933, it is declared unlawful to drive, or cause to be driven, an automobile in the State of Arkansas carrying more than twenty gallons of gasoline in its tanks, unless the State Tax thereon has been paid.

IX

That, under Sections 22, 25, 27, and 28 of Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, a tax of 6½¢ per gallon is levied upon all gasoline sold or used in the State of Arkansas, and

such tax is required to be collected by the manufacturer or wholesaler on sales made within the State of Arkansas, and when not sold within the State of Arkansas, then the tax shall be collected when the fuel is first brought into the State.

X

That, under Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27 and 28 of Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, there is levied a tax of 6½¢ per gallon upon all gasoline, in excess of twenty gallons, brought into the State of Arkansas, in the tanks of the busses operated by the Plaintiff.

XI

That, the highest Court of last resort of the State of Arkansas has construed the statutes hereinabove set forth, and the tax levied thereunder, to be a privilege tax for the use of the highways, and that the Legislature has declared the public policy of the State to be to tax all gasoline sold or used in this State, for such purposes, in order to prevent fraud and imposition on the State, in the sale or use of a comparatively negligible quantity for other purposes.

XII

That all of the revenues, derived and collected by the State of Arkansas from the above cited statutes, become a part of the highway revenues of the State of Arkansas, and are devoted, allocated, and used for the purpose of building, maintaining and improving the highways of the State of Arkansas, and for the payment of principal and interest [fol. 39] upon outstanding highway obligations; and that no part of said revenues goes into, or becomes a part of, the General Revenue Fund of the State of Arkansas.

XIII

That the tax imposed under the statutes herein involved, and the payment thereof by the Plaintiff, will not work an undue hardship upon it, nor materially increase its expenses of operation, and does not unduly burden or confiscate the business of the Plaintiff.

XIV

That the Plaintiff is amenable and subject to the provisions of Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, and should pay tax at the rate of 6½¢ per gallon upon all gasoline, in excess of twenty gallons, brought into the State of Arkansas, in the tanks of its busses.

XV

That the Plaintiff can operate its busses within the State of Arkansas, over the routes heretofore set forth, upon twenty gallons of gasoline, and that, therefore, no extra burden or increased cost is placed upon it by the statutes hereinunder attacked.

XVI

That, under its schedules of operation, ample time is afforded the Plaintiff to refill its fuel tanks at its Arkansas termini, prior to beginning a return trip, and before passengers are permitted to enter, and without danger or inconvenience to its passengers and the traveling public.

XVII

That it is physically possible for Plaintiff to build and maintain, within the State of Arkansas, gasoline storage facilities ample for its requirements and needs.

XVIII

The Court further finds that the demand made upon the Plaintiff by the Defendant herein, requiring it to pay the tax in question, is a valid demand.

[fol. 40] Conclusions of Law

The Court finds as its conclusions of law from the foregoing facts:

I

That the relief sought by the Plaintiff should be denied, and its application for an injunction against the Defendant should be dismissed.

II

That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27 and 28 of the Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, in so far as the same applies to and affects the Plaintiff, is constitutional and valid, and is not violative of Act 1, Section 8, Clause 3 of the Constitution of the United States.

III

That the demand of the Defendant upon the Plaintiff for the payment of the tax in question is a valid demand, and Plaintiff is liable for the payment thereof.

IV

That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27, and 28 of Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, in so far as the same applies to and affects the Plaintiff, is constitutional and valid, and is not violative of Amendment 14, commonly known as the due process clause of the Constitution of the United States.

V

That an appropriate decree embodying the findings and conclusions herein expressed may be entered.

Thomas C. Trimble, Jr., Judge.

[File endorsement omitted.]

[fol. 41] In United States District Court for the Western Division of the Eastern District of Arkansas

No. 2655

Dixie Greyhound Lines, Inc., Plaintiff,

vs.

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, et al., Defendant

Opinion—Filed March 31, 1938

This suit, brought by Dixie Greyhound Lines, Inc., involves an attack upon the validity of Act 67 of the General

Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27, and 28 of Act 11 of the Special Session of the General Assembly for the year 1934. The Defendant is the duly appointed, qualified, and acting Commissioner of Revenues of the State of Arkansas, and, under the foregoing statutes, is duly authorized to collect and enforce payment of the tax involved in this controversy.

Act 67 of 1933 provides that it shall be unlawful for any person to drive, or cause to be driven over the highways of the State of Arkansas, any automobile carrying more than twenty gallons of gasoline in its tank, unless the State Tax shall have first been paid thereon. The applicable sections of Act 11 of 1934, commonly known as the Refunding Act, levy a tax of 6½¢ per gallon on all gasoline sold or used in the State of Arkansas, and provide the method and manner by which said tax shall be collected and paid.

Plaintiff is a common carrier engaged in transportation of persons, baggage, and light express, and in the conduct of its business, operates a bus line from Memphis, Tennessee to Blytheville, Arkansas, Jonesboro, Arkansas, and to the Arkansas-Missouri line, over Highway 61, en route to Saint Louis, Missouri. The record reflects that each of these operations may be conducted by Plaintiff with less than twenty gallons of gasoline, but Plaintiff contends such operation is neither practical nor safe.

The Court of last resort of the State of Arkansas, in its case of Sparling vs. Refunding Board, 189 Ark. 189, has construed the gasoline taxing provisions of Act 11 of 1934, and has concluded that such tax is a privilege tax for the use of the highways, and has found that the Legislature of the State has declared the public policy of the State to be to tax all gasoline sold or used in the State for such purpose, in order to prevent fraud and imposition on the State in the sale or use of a comparatively negligible quantity for other [fol. 42] purposes. This interpretation of the statute is binding upon this Court. See Morehead vs. New York, 298 U. S. 585, 80 L. Ed. 1347.

The record further shows that all funds, collected by the State of Arkansas from the sale or use of gasoline, are used for the purpose of building, maintaining, and repairing its system of State Highways, and for the additional purpose of meeting and paying maturities and interest upon highway obligations heretofore issued, and that none of the funds

thus collected go into, or become a part of, the General Revenue Fund of the State. See Act 11 of 1934.

It has now become a generally recognized principle of law that a state may lawfully tax interstate carriers using its highways for private gain; not for the privilege of engaging in interstate commerce, but as compensation to the State for the use of its highways, and more especially where the proceeds of such tax are, as in the instant case, used for the purpose of constructing and maintaining a highway system. See Sprout vs. South Bend, 277 U. S. 169, 72 L. Ed. 836; Kane vs. New Jersey, 242 U. S. 160, 61 L. Ed. 222; Clark vs Poor, 274 U. S. 554, 71 L. Ed. 1199; Interstate Buses Corporation vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551; Hendrick vs. Maryland, 235 U. S. 610, 59 L. Ed. 385.

The Plaintiff herein contends not that the tax, thus levied by the State of Arkansas upon the sale and use of gasoline, is confiscatory, but that to pay the tax would increase its costs of doing business, and thereby lessen its profit of operation, and that to purchase gasoline within the State of Arkansas is not practical nor safe to the traveling public. This contention is untenable. When the power to tax exists, the extent of the burden is a matter for the discretion of the law makers. Even if a tax should destroy a business, it would not be made invalid or require a compensation upon that ground alone. Those who enter upon a business take that risk. See Fox vs. Standard Oil Company of New Jersey, 294 U. S. 87, 79 L. Ed. 780; Magnano Company vs. Hamilton, 292 U. S. 40, 78 L. Ed. 1109.

The Supreme Court of the United States, in the recent case of Bingaman vs. Golden Eagle Western Lines, 297 U. S. 626, 80 L. Ed. 928, had occasion to pass upon a question not unlike that herein involved. That case involved an attack upon a statute of the State of New Mexico, levying an excise tax of 5¢ per gallon upon the sale and use of gasoline and motor fuel oil. The Bus Company involved operated a line of busses in interstate commerce, over the highways of the [fol. 43] State of New Mexico, with gasoline purchased in another state. It refused to pay the New Mexico tax, and brought a suit to restrain the enforcement of the statute, contending that it violated the commerce clause of the Federal Constitution.

The Supreme Court, in passing upon this contention, used the following language:

"The case turns upon the question of whether the pertinent statutory provisions exact a charge as compensation to the State for the use of its highways, or impose an excise tax for the use of an instrumentality of interstate commerce. If the former, the tax should be sustained; if the latter, it clearly contravenes the commerce clause, and must be held bad."

Applying the foregoing test to the statutes involved in the case at bar, the conclusion is reached that the statutes under attack are constitutional and valid, and constitute a valid and proper exercise of the taxing authority of the State of Arkansas. See also Clyde Mallory Lines vs. State of Alabama, 296 U. S. 261, 80 L. Ed. 215; Morf vs. Bingaman, 298 U. S. 406, 80 L. Ed. 1245; Bowman vs. Continental Oil Company, 256 U. S. 642, 65 L. Ed. 1139.

Plaintiff insists that the case of Helson vs. Kentucky, 279 U. S. 245, 73 L. Ed. 683, is decisive of the issues involved in this case. A careful reading and analysis of that case discloses a striking dissimilarity between the situation obtaining in that case and in the case at bar. In that case, the State of Kentucky endeavored to collect a tax upon the gasoline used by a ferry boat operating on a river. The question of state owned facilities or state owned highways was not in any manner involved. The question of the use of public property by an interstate carrier for private gain was not an issue in the case. In the instant case, state owned facilities, consisting of many miles of improved highways, built and maintained at an enormous expense, and used by a common carrier for private gain is directly involved. The proceeds of the tax involved are used directly and specifically for the purpose of keeping, in a state of repair, those highways which Plaintiff uses in the daily conduct of its business. It is a rule of law, now firmly entrenched, that interstate commerce must pay its own way, and must pay for those facilities furnished it by the various states, provided such charges are reasonable and bear a fair degree of relationship to the facilities afforded; and no complaint is made in this instant case that the charges made by the State of Arkansas are neither reasonable nor fair.

[fol. 44] Plaintiff further relies upon the fact that the gasoline used in the operation of its busses, over the highways of the State of Arkansas, has been previously taxed by the State of Tennessee. Unfortunately, this fact does not in any manner preclude the State of Arkansas from

likewise exacting a tax for the use of its highways. If Plaintiff chooses to purchase its gasoline within the State of Tennessee, rather than to purchase same within the State of Arkansas, this is a matter with which the Courts are not concerned. It is a matter of business policy and business expediency which addresses itself solely to those in charge of the affairs of the Plaintiff. Such a course of conduct can neither bind, nor prevent, the State of Arkansas from collecting, and from enforcing collection, of obligations legally due it, and such fact affords Plaintiff no defense against the payment of the tax herein involved.

Since Plaintiff has elected to bring into the State of Arkansas more gallons of gasoline than is permitted to be brought tax exempt, by the laws of the State of Arkansas, and since, under the interpretation of the statutes in controversy by the Court of last resort of the State of Arkansas, such excess amount of gasoline is taxable, and the proceeds from such tax are devoted entirely to the expense of maintaining a highway system in this State, it is the opinion of the Court that the Acts under attack are constitutional and valid; and that the prayer for an injunction to enjoin the Defendant from collecting such tax should be denied.

The relief prayed will be denied; the statutes in controversy will be held constitutional and valid, and appropriate findings of fact, conclusions of law, and decree, in accordance with this opinion, may be prepared.

Thomas C. Trimble, Jr., Judge, U. S. District Court
Eastern District of Arkansas.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION OF PLAINTIFF, DIXIE GREYHOUND LINES, INC., FOR REHEARING AND FOR ORAL ARGUMENT—Filed April 2, 1938

To the Honorable Thomas C. Trimble, Judge of the District Court for the Eastern District of Arkansas:

The petitioner, Dixie Greyhound Lines, Inc., plaintiff in the above entitled cause, shows to the Court:

1. That heretofore this Court, of its own motion, ordered that this cause be submitted on briefs of counsel, without oral argument.

[fol. 45] 2. That on March 31, 1938, this Court filed herein its findings of fact and conclusions of law, and its opinion in the cause, concluding that the tax complained of by the plaintiff was valid and collectible from the plaintiff, and that the plaintiff was not entitled to the relief sought. No decree has yet been entered in the cause.

3. The Court, in its opinion, concludes that the plaintiff is liable for tax on all gasoline in excess of twenty gallons brought into the State of Arkansas in the tanks of its buses then engaged in interstate journeys, and without regard to whether the gasoline in such tanks is or is not to be used in propelling the vehicle upon the highways of Arkansas or upon the highways of Missouri or Tennessee.

In so finding, the Court has completely ignored (and in its findings and opinion does not even refer to or mention) that proposition of law, urged by the plaintiff and embodied in the decision of the Supreme Court of the United States in Interstate Transit, Inc. vs. Lindsey, 283 U. S. 183, to the effect that while a state may under certain restricted conditions impose a tax upon an interstate carrier for the use of the highways, such a charge is a direct burden upon interstate commerce and the state may demand only fair compensation for the use; and further, and especially, that "being valid only if compensatory, *the charge must necessarily be predicated upon the use made, or to be made, of the highways of the State*" (page 190); and that, where no sufficient relation exists between the measure of the charge and the degree of use, the imposition cannot stand.

Even if every portion of the Court's findings and opinion were sound (which is not conceded, as hereafter appears), the above mentioned principle is decisive of the cause in favor of the plaintiff. The tax demanded is not on the excess over 20 gallons used on the roads of Arkansas; it is on every gallon, in excess of 20 gallons, which may happen to be in the tank at the time of entering Arkansas, regardless of the time or place of use. As clearly pointed out in the brief on behalf of the plaintiff, a vehicle may enter the state one day, let us say bound from Memphis to Blytheville, with ninety gallons in its tank, and it is taxed on seventy

gallons; whereas, the next day the same vehicle may cover the same route but, because it brought in only thirty gallons, it is taxed on ten gallons. The amount of this tax, which must be related to the degree of the use if it is to be [fol. 46] valid at all, is wildly, grotesquely fortuitous. It is as absurd as though the tax for the "use of the road" were decreed to be "all the money which the operator happens to have in his pocket on entering the state". The tax does not even deign to inquire how much actual use the vehicle is to make of the roads; the state does not care whether that use is small or great. The only question the operator is asked is, "How much gas is there in your tank?" If there is much you pay much; if there is little, you pay little (or nothing); yet your destination may be the same in each case, or the man with little may be going further than the man with the full tank.

This principle of law, which Judge Martineau found so obviously applicable as to justify a decision from the bench, following oral argument, was advanced in the brief of plaintiff, and was not even mentioned or attempted to be answered by the defendant, and has not been mentioned by this Court in its findings or opinion. It is submitted that the principle established by the case of Interstate Transit, Inc. vs. Lindsey, supra, is decisive of this cause in favor of the plaintiff, and that the opinion and findings of the Court should at this time be amended so as to grant the relief prayed for.

4. That those findings of fact, filed by the Court herein, are inaccurate or erroneous in the following respects, among others:

(a) In Finding No. IX, the Court finds as a fact that when gasoline is not sold in the state "then the tax shall be collected when the fuel is *first brought into* the state?" whereas, in point of fact the applicable language of Section 25 of the Act in question is "when first brought into this state *for use therein*." Yet the opinion of the Court holds such gasoline in excess of 20 gallons to be taxable when brought into the state, regardless of whether same is to be used therein.

(b) Finding No. XI is not a finding of fact at all, but is a conclusion of law. Treated as a conclusion of law, it is unsound; because the actual decision of the Arkansas Supreme Court, while effecting to characterize the tax as a

privilege tax for the "*use of the highways*", actually construes it as applicable to all non-highway uses, which is a complete contradiction in terms. Both conclusions cannot be true. Yet this Court is, in effect, accepting both as true, unmindful of the principle announced by the United States [fol. 47] Supreme Court that while the state Court's construction of a state statute must be accepted, the Federal Courts are not bound by characterization placed upon the tax by the state Court, but will draw and give effect to their own conclusions with respect to the actual character and effect of such tax.

St. Louis S. W. R. Co. vs. Arkansas, 235 U. S. 350;
St. Louis Cotton Compress Co. vs. Arkansas, 260 U. S. 346.

This Court, insofar as its findings and opinion indicate, has made no attempt to apply this test, although the construction and characterization of the tax by the state Court constitute in themselves a contradiction in terms and cannot stand together.

(c) Finding No. XII is erroneous, in that it states that gasoline tax revenue becomes part of the highway revenue and is devoted to and used for the purpose of building and improving the highways of the state, and for paying the interest and principal of outstanding highway obligations, and that no part of the revenue goes into the general fund. As there is no record evidence as to any phase of the above questions, it is inferred that the Court must have been taking judicial notice of Arkansas statutes. However, it is submitted that the obligations of the State of Arkansas, for highway construction past or future, are the general obligations of the state, and its responsibility therefore is not limited to gasoline tax revenue. As the New Mexico Court says in the case of Breece vs. Mirabel, 287 Pac. 692, at 701, where a similar proposition was advanced to support the tax, this is merely a financial arrangement by the state to make certain the prompt payment of its obligations, and is immaterial in determining the character of the tax.

(d) Finding No. XIII is not supported by the record; and, if true, is immaterial and forms no basis for the legal conclusion which the Court bases upon it. It is in evidence and undisputed that the imposition of this tax will very materially increase the costs of the plaintiff, either in

the increased cost of gasoline or in the construction of unneeded facilities, and would impair the service. Specifically, it is in evidence that gasoline was selling at five cents a gallon, plus freight at 2.8 cents. This cost of 7.8 cents, plus the Tennessee tax of 7.4 cents (which plaintiff must pay on all gasoline coming to rest in Tennessee) aggregate 15.2 cents. The Arkansas tax of 6½ cents would therefore increase the plaintiff's fuel cost about 43%.

[fol. 48] Furthermore, in a case such as this, involving a burden on interstate commerce, it is not a prerequisite to invalidity that the tax should be unduly burdensome or confiscatory. In implying, that such a tax directly imposed upon the interstate carrier in the very act of its interstate journey, must be found unduly [burden*home*] or confiscatory before it can be found invalid, the Court has departed from the very fundamentals of this type of question.

This burden is laid directly upon the exercise of the privilege of interstate commerce; the interstate carrier in the course of his interstate journey is told that he must pay a tax or his progress will be stopped and he will be fined and jailed. Yet—

"Any state statutes *which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause.*"

Furst vs. Brewster, 282 U. S. 493, at 498.

Illustrative of this fundamental rule are:

Ozark Pipe Line vs. Manier, 266 U. S. 555, 562.
Leloup vs. Mobile, 127 U. S. 640, 648.
Lyng vs. Michigan, 135 U. S. 161, 166.

Under the fundamental principle of these cases, no burden, however light, may be directly laid upon interstate commerce. This rule is reaffirmed in Helson vs. Kentucky, 279 U. S. 245; and it is subject to no exception, other than that of the impost upon interstate carriers for use of the roads, and as already set forth, that impost cannot be valid unless reasonably related to the use to be made of those roads.

(f) Finding No. XIV is not a conclusion of fact, but is a conclusion of law, being in effect the entire legal question involved in the case. It therefore does not deserve to be treated as a question of fact, or given weight as such.

(g) Finding No. XV is not supported by the record. It is an undisputed mathematical fact that plaintiff cannot operate its buses from Memphis to Jonesboro or Blytheville and return on twenty gallons. And, if those buses can traverse the State of Arkansas between Memphis and the Missouri line on Highways 70 and 61, on twenty gallons of gasoline, such fact would be misleading in view of the additional fact that those buses could not reach Carruthersville [fol. 49] where storage is available. The buses make five miles to the gallon, and from Memphis to Corruthersville is 105 miles. Hence this finding is partially erroneous and wholly misleading.

(h) Finding No. XVI is erroneous in part, in that the record shows such time for filling tanks to be available only in Jonesboro or Blytheville in the case of local buses, and is not shown to be available elsewhere, particularly on the important St. Louis-Memphis through route.

(i) Finding No. XVII is true so far as it goes; but the Court omits the undisputed fact that such facilities for storage of gasoline in Arkansas would constitute an entirely useless expense, and to that extent burden the interstate transportation.

(j) Finding No. XVIII, purporting to be a finding of fact, is not such, but is a conclusion of law; and it is therefore not entitled to the status of a finding of fact.

5. Those Conclusions of Law filed by the Court in the cause are erroneous; insofar as they collectively reach the legal conclusion that the Acts of the State of Arkansas, therein mentioned, are valid as applied to this plaintiff and that the plaintiff is legally liable for a tax of 6½ cents per gallon of gasoline for each gallon in excess of twenty gallons brought into the State of Arkansas in the tanks of its interstate buses.

6. This cause having been directed by the Court, of its own motion, to be submitted on briefs, and the findings and opinion of the Court failing to reflect consideration of numerous propositions of law raised by the plaintiff, it is submitted that an oral argument of the cause is required, in order that plaintiff's counsel may more thoroughly present to the Court the propositions involved, and that such oral argument should now be had.

Wherefore, Petitioner Prays that this Court will grant a rehearing and oral argument of said cause on such terms as to the Court shall seem proper.

Dated this April 1, 1938.

Chandler, Shepherd, Owen & Heiskell, Barber & Henry, Attorneys for Plaintiff.

[fol. 50] *Duly sworn to by J. H. Shepherd, jurat omitted in printing.*

Endorsed: "Filed Apr. 2, 1938, Sid B. Redding, Clerk."

(Refiled in identical terms on April 22, 1938)

IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFF FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed April 6, 1938

Comes the plaintiff, Dixie Greyhound Lines, Inc., and moves the Court to find the following facts in addition to the findings heretofore filed in this cause:

I

The tax in question is levied upon and the amount thereof fixed by the number of gallons of gasoline which happen to be in the fuel tanks of the motor vehicles at the time such vehicles cross a state line into Arkansas; and such tax has no relation to the number of miles of highways of the State of Arkansas over which the vehicle is to pass, or to the amount of use of such highways, or to the amount of wear and tear incident to such use of such highways, by such motor vehicle.

II

The tax in question is a tax upon gasoline bought in other states and brought into the state of Arkansas in the fuel tanks of the motor vehicles, and is levied upon, and the amount thereof is fixed by, the number of gallons of gasoline contained in said fuel tanks regardless of whether said gasoline is used in propelling such motor vehicles over the

highways of the state of Arkansas or is carried through the state of Arkansas into other states and used in propelling such motor vehicles over the highways of other states.

[fol. 51]

III

The Commissioner of Revenues of the State of Arkansas has demanded that the plaintiff pay to the State of Arkansas a gasoline tax of 6½¢ per gallon upon each gallon of gasoline, in excess of 20 gallons, brought into the State in the tanks of its [guses], without regard to whether such gasoline was used in propelling the bus within the State of Arkansas or was used in propelling the bus in other States, or was intended merely as a reserve to provide for contingencies or emergencies. Such demand by the defendant was made pursuant to a conception of duty as Commissioner of Revenues of the State of Arkansas, under the terms of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, and Act 67 of the General Assembly of Arkansas of 1933.

IV

In addition to the facts found by the Court in paragraph IV of his findings heretofore filed, the following:

Upon this route 261.8 miles are within the State of Missouri, and 3 miles are within the State of Tennessee.

V

In addition to the facts found by the Court in paragraph VI of his findings heretofore filed, the following:

But such buses cannot be operated from Memphis to Jonesboro and return upon 20 gallons of gasoline; or from Memphis to Blytheville and return on 20 gallons of gasoline. That while such buses can actually traverse the State of Arkansas on the route from Memphis to St. Louis without using an entire 20 gallons, such 20 gallons is insufficient to carry the bus the entire distance between Memphis and Carruthersville, at which point such facilities are available. In no single instance can the buses of the plaintiff run from Memphis to their termini and return, or from Memphis to the next gasoline storage facilities of the plaintiff, on 20 gallons of gasoline.

VI

That the facts found by the Court in paragraph IX of his findings heretofore filed, be amended so that the last provision thereof regarding gasoline not sold within the State be made to read:

"And when not sold within the State of Arkansas then the tax shall be collected when the fuel is first brought into the State 'for use herein' ".

(See Code Sec. 6872, Chapter 11, Acts of 1934 Sec. 25).

[fol. 52]

VII

That the facts found by the Court in paragraph XII of his find-s heretofore filed, be amended so as to designate the percentage of tax applied to different highway uses, as provided in the statutes, as follows:

"All net tax derived from motor vehicle fuel under the provisions of the statutes above cited, shall be divided: 92.3% shall be deemed State highway revenue, and 7.7% shall be deemed County highway improvement revenue," and shall be expended in accordance with the provisions of said legislative enactments as set out in the Code Sec. 6604.

VIII

In connection with findings 13, 15, 16, 17, the Court is asked to find the following:

Since the cost of motor fuel is one of the principal expenses in furnishing transportation, and since the plaintiff operates as a certificated public carrier, supervised by the State Commissions and the Interstate Commerce Commission, it is necessary to the efficient operation of the Company that it should exercise diligence in purchasing gasoline as cheaply as possible and in obtaining a uniform quality and proper grade of gasoline, for the effect of increasing the cost of the motor fuel is ultimately to increase the cost of transportation furnished.

It is impracticable from an accounting and operating point of view, to permit the casual purchase of gasoline for the use of a bus in the course of a journey.

The filling of gasoline tanks in buses at roadside filling stations in a casual manner also constitutes a risk to the

passengers on such bus, a delay in the service, incidental road failures and an inconvenience to the passengers.

The plaintiff maintains major gasoline storage facilities at Memphis, Tennessee and at St. Louis, Missouri. Each of these cities offers water transportation and is strategically located with respect to the routes traveled by the plaintiff's buses, affording the plaintiff an opportunity to have cheaper gasoline available at convenient localities.

While it is physically possible for the Company to create and maintain gasoline storage facilities in the State of Arkansas, from an operating point of view it is uneconomi- [fol. 53] cal to set up such facilities at any point within such State on the lines of the plaintiff. There is no point within the State of Arkansas, on any of the routes traversed by the plaintiff within that State which offers advantages for the efficient purchase and storage of gasoline, or where the acquisition and maintenance of storage facilities would not be a useless expense and waste of money involving unnecessary duplication of facilities.

Comes the plaintiff, Dixie Greyhound Lines, Inc., and moves the Court to specify the following conclusions of law in addition to the conclusions heretofore filed in this cause:

I

There is no sufficient relation between the measure employed in fixing the amount of the tax here under consideration and the extent or manner of use by the plaintiff of the highways of the State of Arkansas to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses.

II

As a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, the charge levied must be necessarily predicated upon the use made or to be made, of the highways of the state, the number of miles traveled, or the degree of wear and tear incident to such use, and cannot be arbitrary or unrelated to the amount of such use.

The foregoing conclusions of law are based upon the recent case of Interstate Transit Company, Inc., vs. Lindsey, County Court Clerk, 283 U. S. 183, 51 Supreme Court, 380.

III

That the aforesaid Acts of the State of Arkansas, as interpreted by the defendants and sought to be applied against the plaintiff, are invalid as contrary to Article I, Section 8, Clause 3, being the so-called commerce clause, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. The tax in question purporting to be a license or privilege tax, cannot be sustained as a valid license or privilege tax for the use of the highways of the State of Arkansas.

[fol. 54] To the Findings of Fact and Conclusions of Law which are inconsistent with the foregoing requested Findings of Fact and Conclusions of Law, the plaintiff reserves its exceptions.

Respectfully submitted,
Barber & Henry, Chandler, Shepherd, Owens & Heiskell, Attorneys for Plaintiff, Dixie Greyhound Lines, Inc.

[File endorsement omitted.]

In United States District Court, Eastern District of Arkansas, Western Division

No. 2655

Dixie Greyhound Lines, Inc.,

[—]

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, et al.

Decree—April 4, 1938

This cause came on to be heard at this term upon briefs of counsel; and on consideration hereof, it is ordered, adjudged and decreed as follows:

That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, insofar as said Act, under the tes-

timony and pleadings, applied to the plaintiff herein, is in all respects constitutional and valid.

That the State of Arkansas is entitled to collect in the manner provided by the statutes above named, a tax of 6½¢ per gallon on each gallon of gasoline, in excess of twenty (20) gallons, hereafter brought into the State of Arkansas in the tanks of plaintiffs' buses.

[fols. 55-59] That the relief sought by the plaintiff herein, and its application for an injunction, be and the same is hereby in all respects denied and its bill dismissed. That the costs of this action shall be paid by the plaintiff.

To the action of the Court in adjudging said statutes constitutional as applied to the plaintiff herein, and in dismissing its bill, plaintiff excepts and petitions the Court for rehearing, and for additional and different findings of fact.

Thomas C. Trimble, Jr., Judge.

Dated this April 4th, 1938.

Endorsed: "Filed Apr. 12, 1938. Sid B. Redding, Clerk."

[fol. 60] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING PETITION FOR REHEARING AND MOTION FOR ADDITIONAL FINDINGS OF FACT—Filed May 27, 1938

This cause came on to be heard this date upon the petition of Dixie Greyhound Lines, Inc. for a rehearing and for [fol. 61] oral argument and upon the motion for additional findings of fact and conclusions of law, heretofore filed by Dixie Greyhound Lines; and thereupon, after hearing argument upon said petition and motion, the Court is of the opinion that said petition for rehearing, and said motion for additional findings of fact and conclusions of law should be overruled, except as to the request of the Plaintiff to correct the Court's Finding of Fact No. IX, which is granted by removing the period after the word "State", appearing in the last line of said Finding, and adding thereto the words "for use herein".

It is accordingly ordered, adjudged and decreed that except, that as above set forth, the petition for rehearing

and motion for additional findings of fact and conclusions of law be and the same are hereby overruled.

To the action of the Court in so ordering, the Plaintiff excepted, and gave notice in open Court of its intention to appeal, which appeal is by the Court granted, upon the plaintiff's complying with the statutes in regard thereto, and filing an appeal bond, with acceptable surety, in the amount of $500.00 and, if the plaintiff should elect to supersede the judgment of the Court herein, it shall give supersedeas bond in such an amount and embodying such provisions as may be ordered by this Court.

Thomas C. Trimble, Judge, United States District Court, Eastern District of Arkansas, Western Division.

OK: Chandler, Shepherd, Owen & Heiskell, Attorneys for Plaintiff.

OK: Louis Tarlowski, Attorney for Defendant.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

Abstract of Testimony—Filed July 1, 1938

STIPULATION

It was stipulated by counsel that the affidavits of E. W. Smith and Frederick Smith might be offered by either party, and should be received in evidence in the same manner as though affiants had testified personally in the cause to matters in such affidavits set forth.

The plaintiff, Dixie Greyhound Lines, Inc., produced the following testimony:

E. W. SMITH, testifying by affidavit pursuant to such stipulation of counsel, testified as follows:

He is a resident of Memphis, Shelby County, Tennessee, and is Vice-President, Assistant General Manager, and Member of the Board of Directors of Dixie Greyhound

Lines, Inc. In his capacity of Assistant General Manager, he is directly in charge of what is known as the Operating Department of Dixie Greyhound Lines, Inc., which Department has control and management of the actual running and operation of the motor buses employed in the business of Dixie Greyhound Lines, Inc., the servicing of said motor buses, and the control of the personnel employed in such operation. In his capacity as Vice-President and Director, the affiant is familiar with the general corporate business of Dixie Greyhound Lines, Inc., and with its methods of doing business wherever its operations are conducted, and with the certificates of convenience and necessity, and/or interstate operating rights held by that Company. The affiant is the officer of said Company most familiar with the particular details hereinafter referred to in this affidavit.

Dixie Greyhound Lines, Inc., is a corporation organized and existing under the laws of the State of Delaware, but having its principal office in the City of Memphis, Tennessee, and qualified to do business in the States of Tennessee, Arkansas, Missouri, and elsewhere. The business of said corporation is the transfer of passengers by motor vehicle, and the lines operated by Dixie Greyhound Lines, Inc. or [fol. 63] by its wholly owned subsidiary, Dixie Greyhound Lines, Inc. of Illinois, traverse or enter the States of Tennessee, Alabama, Arkansas, Mississippi, Missouri, Kentucky, Illinois, and Indiana. The Company is a subsidiary of the Greyhound Corporation, and is an affiliate of what is known as the Greyhound System. As such, its operations are to a very considerable degree integrated with those of other Companies having a similar affiliation, with the purpose of maintaining a transportation system in which each Company is supposed to do its part in the furnishing and maintenance of prompt and efficient service, to the motor vehicle traveling public.

Dixie Greyhound Lines, Inc., (sometimes in this testimony referred to as the "Company" or "Dixie") is a common carrier; and as such it is under the control and regulation of the Public Utility regulatory bodies of the various States in which it does an intrastate business, and under the control of the Interstate Commerce Commission with respect to its interstate business wherever carried on. As a matter of fact, the various Commissions above mentioned

exercise over the Company that control usually exercised over a public utility.

The Company owns and holds, in various states, numerous certificates of convenience and necessity and operating rights issued or granted to it by the Public Service Commissions of such States, authorizing its operation within those States. Pursuant to certificates of convenience and necessity granted to it by the Public Service Commissions of the States of Tennessee, Arkansas and Missouri, the Company operates motor bus transportation for the carrying of passengers, baggage and light express, in both directions, over and upon the following interstate routes, among others:

(1) Between Memphis, Tennessee and St. Louis, Missouri; traversing the streets and highways of the City of Memphis and State of Tennessee, on United States Highway No. 70 to the Tennessee-Arkansas line, and thence through Arkansas on Highway U. S. 70 to West Memphis; from this point, the route follows United States Highway No. 61 through Turrell, Osceola, Blytheville, and the other towns located upon that road, to the Arkansas-Missouri line; thence the route follows U. S. 61 through Missouri (diverting for several miles to enter the City of Caruthersville, Missouri), to St. Louis. According to the mileage log compiled and used by the Company, the distance between Memphis and St. Louis is 342.7 miles, measured along the route as the buses actually traverse it. Of this mileage, [fol. 64] three miles are in Tennessee, 77.9 miles are in Arkansas, and the remaining 261.8 miles are in Missouri.

(2) Between Memphis, Tennessee and Blytheville, Arkansas; traversing United States Highway No. 70, from Memphis to the Tennessee-Arkansas line, and thence through Arkansas via U. S. 70 to West Memphis, and via U. S. 61 to Blytheville. Of this route, three miles are in Tennessee and 71.4 miles are in Arkansas.

(3) Between Memphis, Tennessee and Jonesboro, Arkansas; traversing United States Highway No. 70, from Memphis to the Tennessee-Arkansas line, and thence through Arkansas via U. S. 70 to West Memphis, and via U. S. 61 to Turrell, and via U. S. 63 to Jonesboro, through the towns located upon those highways. The distance between Mem-

phis and Jonesboro is 73 miles, of which three miles lie in Tennessee and the remaining 70 miles in Arkansas.

On each of the above mentioned routes, the Company is engaged in furnishing interstate transportation of passengers. Upon the same routes, the buses of the Company also furnish intrastate transportation; but the interstate business is by far the more important. Passengers offering themselves for transportation, whether in interstate or intrastate transportation, are transported in the same buses, and a normal bus trip will contain passengers of interstate and intrastate character. Interstate passengers very greatly predominate in numbers and percentage of ticket sales.

The motor buses used by the Company in the transportation of its interstate passengers, baggage and express, are propelled by gasoline motors. The Company is a very large user of gasoline in its transportation operations, having purchased and consumed in such operations 1,259,401 gallons during the year 1935. The cost of such gasoline at the refinery and the transportation charges and taxes paid thereon, constitute one of the principal elements in the total cost of furnishing transportation. It has been found, through years of experience, that the only economical, safe, practicable and reliable method of obtaining and handling gasoline requires the maintenance by the operating company of storage facilities capable of [accommodating] gasoline in [in] large quantities. Such facilities must be large enough to permit the purchase and storage of gasoline in carload or bargeload quantities; because gasoline may be purchased in such quantities direct from the producers at much lower cost than would be paid by the public for small [fol. 65] quantities, and this economy in purchasing is sufficiently great to materially lower the final transportation cost to the public. It is necessary that such storage facilities be not more numerous than absolutely necessary, because of the expense of installation and maintenance of facilities, and the cost of acquiring or leasing sites for the location of such storage, all of which expenses become a part of the final transportation cost. It is necessary that such storage facilities should be located at strategic points, with reference to the routes traversed by the motor buses; and where such strategic locations also have water trans-

portation available, the saving in transportation charges is very much increased, not only by reason of the fact that water transportation is cheaper in itself, but also because the availability of water competition tends to reduce the competitive railroad rates. It is, therefore, particularly necessary that, wherever circumstances permit, storage facilities should be set up where water transportation is available. It is further necessary that the Company should exercise supervision over the quality and grade of the gasoline used by it, and should see that such gasoline is not only of the proper grade, but also uniform; because, variations of grade and type which would make little difference in the cost of operation of a single pleasure car, would cause an important increase in cost in the course of a year, and in the case of a public carrier of the type of Dixie Greyhound Lines, Inc., which operates in excess of six million miles per year. It is quite impracticable, from an accounting and operating point of view, to permit the casual purchase of gasoline for the use of a bus in the course of a journey.

Variation from proper operating practices, as above set forth, has the effect of increasing the cost of motor fuel, and thus ultimately increasing the cost of transportation furnished to and paid for by the public and such variations also adversely affect and impede the regularity, safety, reliability and convenience of such transportation. The casual purchase of fuel along the roadside at retail creates delays, while the carrying in the tanks of the buses of insufficient quantity of gasoline is likely to result in an increased number of road failures of the buses because of improper quality and insufficient quantity of gasoline. Either of the above alternatives tends to increase the cost of the transportation, to affect the passengers with such increased cost, and with the inconvenience, annoyance and loss due to incidental roadside delays and trouble, and loss of connections at destinations. Such irregularity and lack of convenience in [fol. 66] transportation would cause to Dixie Greyhound Lines, Inc., itself great damage because of loss of business and good will resulting from inferior service; and further subjects the Company to risk of loss of its certificates of convenience and necessity and operating rights by reason of failure to operate upon the same in a proper and convenient manner. The filling of gasoline tanks and buses at roadside filling stations, in a casual manner, constitutes a

risk to the passengers on such bus, because of the inherent danger of handling gasoline and the hazard of fire caused by static electricity. Because of such danger, the Company makes it a rule to fill the tanks of its buses only at times and places when the passengers have not entered the bus, or have temporarily left it, the Company in promulgating such rule having in mind the panic which might result should a loaded bus catch fire, and the fact that there has been at least one such static fire within its own experience, to an unloaded bus.

With particular reference to its operations between Memphis and St. Louis, and Memphis and Jonesboro, Arkansas, which routes involve all of its operations within the State of Arkansas, the Company maintains major gasoline storage facilities at Memphis, Tennessee, and at St. Louis, Missouri. Each of these Cities offers water transportation, and is properly located with respect to the routes traveled by the Company's buses. In April, 1934, the Company also operated storage facilities at Caruthersville, Missouri, which is also a River point, but these facilities were found to be uneconomical, and are not being used at this time. If it were found necessary to resume their use, it would have the effect of increasing the operating cost, and consequently the cost of transportation. There is no point within the State of Arkansas, on any of the routes traversed by the Company within that State, which offers advantages for the purchase and storage of gasoline, or where the acquisition or maintenance of storage facilities would not prove to be a useless expense to the Company.

In operation over the interstate routes above mentioned, the Company is accustomed to use bus equipment of a type and size sufficient to the convenience of the public, as indicated by the patronage offered. In April, 1934, the buses operated upon the interstate route between Memphis and Jonesboro were of a type and size which would then travel an average of seven and one-half miles for each gallon of gasoline consumed. However, at the present time, the equipment being used upon that particular route is of somewhat larger size; and at this time, all of the buses of the Com- [fol. 67] pany operated between Memphis and Jonesboro and between Memphis and St. Louis will average approximately five miles for each gallon consumed. The Company is accustomed to put into the tanks of its Memphis to Jones-

Loro buses, and into its Memphis to Blytheville and its Memphis to Caruthersville local buses, an amount of gasoline sufficient to transport the bus to its destination and return, with a reasonable margin of safety. In April, 1934, the Company was accustomed to send out its Memphis to St. Louis buses with a quantity of gasoline in the tank sufficient to carry the bus to Caruthersville, where the supply was renewed for the remaining journey to St. Louis; and the St. Louis to Memphis buses were filled at St. Louis. At the present time, however, tanks are filled in Memphis and St. Louis.

As of the date of this testimony (October, 1936) gasoline is currently selling at the refineries for five cents per gallon. To this cost should be added freight to the point of storage, which, in the case of Memphis, is 2.18 cents a gallon. The Company pays to the State of Tennessee a tax of seven cents per gallon and an additional inspection fee of four mills per gallon on all gasoline placed by it in storage in its facility at Memphis, Tennessee, whether such gasoline is used within the State of Tennessee or not, the fact of storage in that State making such gasoline liable for the tax. The Company also pays to the State of Missouri a tax of three cents per gallon on all gasoline placed by it in storage in its facilities in that State, whether such gasoline is used in the State of Missouri or not. Every gallon of gasoline which is carried into the State of Arkansas in the tanks of a motor bus owned by Dixie Greyhound Lines, Inc., has been taxed by, and the tax paid to, either the States of Tennessee or Missouri.

Caruthersville, Missouri, the first River point north of Memphis on the Memphis-St. Louis route, is 105.2 miles distant from Memphis, according to the mileage log of the Company. This mileage log, which has been referred to, is made up from actual mileage readings taken over the routes which the buses actually follow, which routes involve the distance covered in traveling through Cities and off the main highways to towns and Cities served by the buses but not located upon the main route.

Affiant knows it to be a fact that motor cars designed for [pleasure] use generally have a gasoline tank capacity of less than twenty gallons; while commercial equipment of more than the smallest size, is habitually equipped with gasoline tanks holding in excess of twenty gallons, the actual

[fol. 68] tankage varying with the type of equipment and the use for which it is designed.

At this time, the Company is operating two scheduled trips daily in each direction between Memphis and Jonesboro, Arkansas; three scheduled trips daily in each direction between Memphis and St. Louis; two scheduled trips daily in each direction between Memphis and Blytheville, and one scheduled trip daily in each direction between Memphis and Caruthersville, Missouri.

In no single instance can the buses of the Company run from Memphis to their termini and return, or from Memphis to the nearest gasoline storage facilities of the Company on twenty gallons of gasoline.

FREDERICK SMITH, testifying by affidavit pursuant to such stipulation of counsel, testified as follows:

He is a resident of Memphis, Shelby County, Tennessee, and is President, General Manager, and Member of the Board of Directors of Dixie Greyhound Lines, Inc. In his capacity as such President, General Manager and Director, he is in general supervision of all of the business of such corporation, and is acquainted with its methods of operation and the reasons therefor.

The affidavit of E. W. Smith, Vice-President of Dixie Greyhound Lines, Inc., [Inc.], correctly sets forth the facts and matters therein referred to, according to the information, belief and experience of this witness.

As now operated, those motor buses operated by Dixie Greyhound Lines, Inc., from Memphis into and through the State of Arkansas, are accustomed to reach and enter the State of Arkansas, whether from Memphis or from St. Louis, with an amount of gasoline in the tanks of such buses exceeding twenty gallons in amount. It is necessary, from the operating point of view, that more than twenty gallons of gasoline be in such tanks upon such buses reaching the State of Arkansas, for the reason that such buses cannot operate from Memphis to Jonesboro and return upon twenty gallons of gasoline, and, while such buses can actually traverse the State of Arkansas, on the line between Memphis and St. Louis, without expending the entire twenty gallons, such twenty gallons are insufficient to take the bus between Memphis and Caruthersville, Mis-

souri, at which two points storage facilities are available. Dixie Greyhound Lines, Inc., has not to this time paid to [fol. 69] the State of Arkansas any tax upon any gasoline contained in its buses, in excess of twenty gallons, it being the contention of that Company that no tax is due upon such gasoline to the State of Arkansas.

The statement of the witness E. W. Smith to the effect that there are no points within the State of Arkansas on the routes traversed by the Company which offer advantages for the purchase and storage of gasoline, is to be taken to mean that from an operating point of view it is uneconomical to set up facilities at any point within such State, in that the setting up of such facilities would represent an entirely useless expenditure of money on the part of the operating Company. It is physically possible for the Company to create and maintain such facilities in the State of Arkansas; but the sum which would have to be spent in creating and maintaining such facilities would be a complete waste of the money involved.

The statement of the witness E. W. Smith to the effect that all gasoline carried into the State of Arkansas by Dixie Greyhound Lines, Inc., has been taxed by, and the tax paid to, the States of Tennessee or Missouri, is intended to convey, and should convey, the meaning that such gasoline has paid no tax to the State of Arkansas, it being the contention of Dixie Greyhound Lines, Inc., that no tax thereon is due.

It is a fact that buses operated by the Company between Memphis and Blytheville, and Memphis and Jonesboro, are afforded time, after their arrival at their respective termini and prior to their beginning a return trip over the route, and before passengers are permitted to enter the bus, to refill gasoline tanks at these points, if and provided the Company had available facilities for storing or obtaining gasoline at Blytheville or Jonesboro. If Company storage facilities were maintained in Blytheville and Jonesboro, the gasoline available to the buses at those points could be controlled as to quality, etc., as is the gasoline available at Memphis or other major storage points; but if such gasoline were obtained at Blytheville or Jonesboro, from outside parties, such control would not be practicable.

The interstate rates of Dixie Greyhound Lines, Inc., are under regulation of the Interstate Commerce Commission; and the purely intrastate rates of that Company, in the

various States in which it operates, including the State of Arkansas, are under the regulation of the respective Public Utility regulatory bodies of the various States, the intrastate rates in Arkansas being under the supervision and regulation of the Arkansas Corporation Commission, Regu- [fol. 70] lation of these rates is exercised by the Interstate Commerce Commission and by the State bodies in the same manner as is customary with other utilities under the supervision of those bodies. In practice, rates are proposed by the Company, in the form of tariffs promulgated and filed with the regulatory body; such bodies have the right to suspend such rates if they so desire. With respect to interstate rates, jurisdiction of interstate carriers has been vested in the Interstate Commerce Commission for a short time only, and control by that body over the rates of motor carriers has as yet not become generally effective insofar as details are concerned; but it is the opinion of the industry, and this Company is advised, that the power of control of the Interstate Commerce Commission over interstate rates of motor carriers is the same as that heretofore exercised by the Interstate Commerce Commission over similar rates of railroads.

Referring to the testimony of E. W. Smith, the figure of 2.18 cents per gallon therein stated to be the freight rates on gasoline to Memphis, is the freight rate to Memphis by rail from Oklahoma points, as to which Memphis has no shipping advantages over other points in this immediate vicinity. The freight rates on gasoline from New Orleans to Memphis by rail or water is fifteen (15) cents per hundred pounds, which is equivalent to ninety-nine one-hundredths (.99) of one cent per gallon; while the freight rate by rail from New Orleans to both Jonesboro and Blytheville, Arkansas, is twenty-six and five-tenths (26.5) cents per hundred pounds, or one and three-fourths (1.75) cents per gallon.

All interstate and intrastate business handled by Dixie Greyhound Lines, Inc., over any of its lines traversing the State of Arkansas, is handled in the same buses, and without distinction. The Company does not know what will be the character of the patronage offered to a bus which is about to begin a journey, until the passengers actually offer themselves and purchase tickets. It is not practicable, from an operating point of view, to furnish separate buses or ac-

commodations for interstate or intrastate passengers, or to divide the transportation of the two types of business.

The above and foregoing was all of the evidence introduced in the case.

PRAYER OF PLAINTIFF FOR APPROVAL OF STATEMENT OF EVIDENCE

Wherefore, Dixie Greyhound Lines, Inc., plaintiff and appellant, prays that the above statement of evidence be set-
[fols. 71-73] tled, approved and allowed by the Court as a true, full and correct statement of all of the evidence given upon the trial of the case, for use in the appeal taken to the United States Court of Appeals for the Eighth Circuit.

Dated July 1, 1938.

Chandler, Shepherd, Owen & Heiskell, Barber & Henry, Attorneys for Plaintiff and Appellant.

STIPULATION OF COUNSEL APPROVING STATEMENT OF EVIDENCE

It is hereby stipulated that the above and foregoing statement of evidence is true and correct, and may be approved by the Judge without notice.

Chandler, Shepherd, Owen & Heiskell, Barber & Henry, Attorneys for Plaintiff and Appellant.
Louis Tarlowski, Attorneys for Defendant and Appellee.

APPROVAL OF STATEMENT OF EVIDENCE BY DISTRICT JUDGE

The foregoing statement of evidence is in all respects hereby approved and settled as a true and complete statement of the evidence adduced on the trial of the above entitled action.

Dated July 1st, 1938.

Thomas C. Trimble, United States District Judge.

Endorsed: "Filed July 1, 1938, Sid B. Redding, Clerk."

[fol. 74] ASSIGNMENT OF ERRORS—Filed July 1, 1938

Comes now Dixie Greyhound Lines, Inc., plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal to the United States Circuit Court of Appeals for the Eighth Circuit, herewith petitioner for in said cause, from the decrees of this court entered on the 12th day of April, 1938, and the 27th day of May, 1938:

1

The Court erred in holding as a matter of law, and in decreeing, that the plaintiff herein was not entitled to the injunctive relief sought by it, and in denying such relief, and in dismissing the plaintiff's bill.

2

The Court erred in holding as a matter of law, and in decreeing that Act 67 of the General Assembly of the State of Arkansas for 1933, as amended by Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, insofar as said Acts, under the testimony and pleadings, apply to the plaintiff herein, are in all respects constitutional and valid; for the reason that the record in the cause shows without dispute that the said Acts, when applied as alleged in the bill and admitted by the answer, impose a direct burden upon interstate commerce, and are contrary to the commerce clause of the Constitution of the United States.

3

The Court erred in holding as a matter of law, and in decreeing, that the State of Arkansas is lawfully entitled, pursuant to Act 11, of the Special Session of the General Assembly of the State of Arkansas for the year 1934 and Act 67 of the General Assembly of the State of Arkansas for the year 1933, to lay and collect a tax of 6½ cents per gallon on each gallon of gasoline, in excess of twenty (20) gallons brought into the State of Arkansas in the tanks of [fol. 75] the plaintiff's interstate buses in the course of interstate journeys; for the reason that the tax in question imposes a direct burden upon interstate commerce, and

is void as contravening the Commerce Clause of the Constitution of the United States.

4

The Court erred in holding as a matter of law that the tax of 6½ cents per gallon imposed by the State of Arkansas, pursuant to Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934 and Act 67 of the General Assembly of the State of Arkansas for the year 1933, upon the gasoline, in excess of twenty gallons, brought into the State of Arkansas in the buses of the plaintiff, in the course of interstate [journesy], is a tax validly levied by the State of Arkansas as compensation to the State for the use of its highways; for the reason that the said tax, so levied, bears no reasonable relation to the use to be made of such highways.

5

The Court erred in holding that the Supreme Court of Arkansas, in the case of Sparling vs. Refunding Board, 189 Ark. 189, 71 S. W. (2nd) 182, has construed the gasoline taxing provisions of Act 11 of 1934 as imposing a privilege tax for the use of the highways; for the reason that the action of said Supreme Court of Arkansas in such case is wholly inconsistent with such construction.

6

The Court erred in holding that it was bound by, and should follow, the expressed construction of the Supreme Court of Arkansas, in the case of Sparling vs. Refunding Board, 189 Ark. 189, 71 S. W. (2nd) 182, to the effect that the gasoline taxing provisions of Act 11 of 1934 impose a privilege tax for the use of the highways of the State; for the reason that the tax imposed by such Act 11 of 1934 imposes a burden upon interstate commerce and deprives the plaintiff of rights secured by the Constitution of the United States, and in such a case the Courts of the United States are not bound by any characterization of the taxing scheme as adopted by the highest court of the State, but are to apply to such taxing scheme the test of operation and effect of the law, as applied and enforced by the State.

7

The Court erred in holding, as a matter of law, that the language of Act 11 of 1934 is properly interpreted to levy [fol. 76] a tax of 6½ cents upon each gallon of gasoline, in excess of twenty gallons, which may be brought into the State of Arkansas in the tanks of buses of plaintiff in the course of an interstate journey, without regard to whether or not such gasoline in excess of twenty gallons is designed or intended for use, or is used, within the State of Arkansas; for the reason that Section 22 of said Act 11 of 1934 specifically provides that "There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or *used in this state* or purchased for sale or *use in this State*," and Section 25 of said Act specifically provides that "The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, when used in this State; double taxation is not intended". (Emphasis ours.)

8

The Court erred in making the following finding of fact:

"VI. That the busses, operated by plaintiff over and upon the above described routes, are propelled by gasoline motors, and average approximately five miles for each gallon of gasoline consumed; and that twenty gallons of gasoline will be sufficient for each of its busses, upon the above described routes, to traverse the State of Arkansas and its operations therein."

The said finding of fact is inaccurate and misleading; for the reason that, while the buses of the plaintiff can traverse the State of Arkansas itself on twenty gallons of gasoline, the record shows without dispute that said buses cannot so make the entire journey over the longer route lying between Memphis and proper gasoline storage facilities lying in Missouri; and therefore, the conclusion sought to be drawn by the Court, to the effect that the business of plaintiff is not adversely affected by a limitation to twenty gallons, is erroneous.

9

The Court erred in making the following finding of fact:

"XI. That, the highest Court of last resort of the State of Arkansas has construed the Statutes hereinabove set-

forth, and the tax levied thereunder, to be a privilege tax for the use of the highways, and that the legislature has declared the public policy of the State to be to tax all gasoline [fol. 77] sold or used in this State, for such purposes, in order to prevent fraud and imposition on the State, in the sale or use of a comparatively negligible quantity for other purposes."

The said purported finding of fact is not a finding of fact at all, but is a conclusion of law. As a conclusion of law, it is erroneous for the reason that the actual decision of the Arkansas Supreme Court in question, while characterizing the tax levied under Act 11 of 1934 as a privilege tax for the use of the highways, actually construes such tax as applicable to all nor highway uses, which construction is in complete contradiction of the characterization of such tax as a tax for use of the highways.

10

The Court erred in making the following finding of fact:

"XII. That all of the revenues, derived and collected by the State of Arkansas from the above cited statutes, become a part of the highway revenues of the State of Arkansas, and are devoted, allocated, and used for the purpose of building, maintaining, and improving the highways of the State of Arkansas, and for the payment of principal and interest upon outstanding highway obligations; and that no part of said revenues goes into, or becomes a part of, the General Revenue Fund of the State of Arkansas."

The situation therein referred to, if it exists, is immaterial in the present controversy, for the reason that any obligations incurred by the State of Arkansas for highway construction or maintenance are general obligations of the State, for which its responsibility is not limited to gasoline tax revenue, but the statutory provision with respect to application of such revenue is merely a financial arrangement of the State to make certain the payment of its general obligations.

11

The Court erred in making the following finding of fact:

"XIII. That the tax imposed under the statutes herein involved, and the payment thereof by the plaintiff, will not

work an undue hardship upon it, nor materially increase its expense of operation, and does not unduly burden or confiscate the business of the plaintiff."

The said finding is supported by no evidence whatever and is directly contrary to all of the undisputed evidence in the record; and further, it appearing without dispute that the imposition of such tax imposes a direct burden upon interstate commerce, the amount or severity of such burden is [fol. 78] immaterial, and it is not necessary in such a case that the burden should amount to a confiscation of the plaintiff's business.

12

The Court erred in making the following finding of fact:

"XIV. That the plaintiff is amenable and subject to the provisions of Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, and should pay tax at the rate of 6½¢ per gallon upon all gasoline, in excess of twenty gallons, brought into the State of Arkansas, in the tanks of its buses."

The said purported finding of fact [—] at all, but is a conclusion of law. As such it involves in effect the entire legal question of the case, and therefore is not entitled to the status of a finding of fact, or to be given weight as such.

13

The Court erred in making the following finding of fact:

"XV. That the plaintiff can operate its busses within the State of Arkansas, over the routes heretofore set forth, upon twenty gallons of gasoline, and that, therefore, no extra burden or increased cost is placed upon it by the statutes hereunder attacked."

The said finding of fact is unsupported by any proof and is contrary to the undisputed evidence in the record, wherein it appears without dispute that the buses of the plaintiff cannot bake their runs between Memphis, Tennessee, and either Jonesboro or Blytheville, Arkansas, on twenty gallons of gasoline, and further, that while the buses on the

route between Memphis and St. Louis can actually traverse the State of Arkansas itself on twenty gallons, they cannot so traverse the distance lying between Memphis and storage points in Missouri; in either of which cases extra burden is placed upon the plaintiff by the statutes referred to.

14

The Court erred in making the following finding of fact:

"XVI. That, under its schedules of operation, ample time is afforded the plaintiff to refill its fuel tanks at its Arkansas termini, prior to beginning a return trip, and before passengers are permitted to enter, and without danger or inconvenience to its passengers and the traveling public."

[fol. 79] Said finding of fact is erroneous in fact, the record showing without dispute that time for filling tanks is available only at Jonesboro and Blytheville, and only for local buses, and not available to the through buses operating on the Memphis-St. Louis route.

15

The Court erred in making the following finding of fact:

"XVII: That it is physically possible for plaintiff to build and maintain within the State of Arkansas, gasoline storage facilities ample for its requirements and needs."

The said finding of fact is misleading in that, while true as stated, it ignores and fails to give effect also — the further undisputed and co-related fact that such facilities, if constructed, would be useless, and the added expense of same a burden upon interstate commerce.

16

The Court erred in making the following finding of fact:

"XVIII. The Court further finds that the demand made upon the Plaintiff by the Defendant herein, requiring it to pay the tax in question, is a valid demand."

The said purported finding of fact is not a finding of fact at all, but is a conclusion of law. As such, it is not entitled to the status of a finding of fact or to be given weight as such.

17

The court erred in making the following conclusions of law:

"I. That the relief sought by the plaintiff should be denied, and its application for an injunction against the Defendant should be dismissed."

"II. That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27, and 28 of Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, in so far as the same applies to and effects the plaintiff, is constitutional and valid, and is not violative of Article 1, Section 8, Clause 3 of the Constitution of the United States."

"III. That the demand of the Defendant upon the Plaintiff for the payment of the tax in question is a valid demand, and plaintiff is liable for the payment thereof."

"IV. That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, [fol. 80] 27, and 28 of the Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, is constitutional and valid, and is not violative of Amendment 14, commonly known as the due process clause of the Constitution of the United States."

The said conclusions of law, collectively reaching the legal conclusion that the Acts of the State of Arkansas therein mentioned are valid as applied to the plaintiff, are erroneous for the reason that the tax therein imposed upon gasoline brought into the State in the tanks of buses engaged in interstate journeys constitutes a direct burden upon interstate commerce and bears no reasonable relation to the use to be made of the highways of the state.

18

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff.

"I. The tax in question is levied upon and the amount thereof fixed by the number of gallons of gasolien which happen to be in the fuel tanks of the motor vehicles at the time such vehicles cross a state line into Arkansas; and such

tax has no relation to the number of miles of highways of the State of Arkansas over which the vehicle is to pass, or to the amount of use of such highways, or to the amount of wear and tear incident to such use of such highways, by such motor vehicle."

The facts contained in such requested finding were nowhere else found or mentioned by the Court, but were essential to the proper consideration and decision of the case and were undisputed in the record.

19

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"II. The tax in question is a tax upon gasoline brought in other states and brought into the State of Arkansas in the fuel tanks of the motor vehicles, and is levied upon and the amount thereof is fixed by the number of gallons of gasoline contained in said fuel tanks regardless of whether said gasoline is used in propelling such motor vehicle over the highways of the State of Arkansas or is carried through the State of Arkansas into other states and used in propelling such motor vehicles over the highways of other states."

[fol. 81] The facts contained in such requested finding were nowhere else found or mentioned by the Court, but were essential to the proper consideration and decision of the case and were undisputed in the record.

20

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"III. The Commissioner of Revenues of the State of Arkansas has demanded that the plaintiff pay to the State of Arkansas a gasoline tax of 6½ cents per gallon upon each gallon of gasoline, in excess of 20 gallons, brought into the State in the tanks of its buses, without regard to whether such gasoline is used in propelling the bus within the State of Arkansas, or is used in propelling the bus in other states, or was intended merely as a reserve to provide for con-

tingencies or emergencies. Such demand by the defendant was made pursuant to a conception of duty as Commissioner of Revenues of the State of Arkansas, under the terms of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, and Act 67 of the General Assembly of Arkansas of 1933."

The facts contained in such requested finding were nowhere else found by the Court, but were essential to the proper consideration and decision of the case, and were alleged in the bill and admitted by the answer.

21

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"IV. In addition to the facts found by the Court in paragraph IV of his findings heretofore filed, the following: "Upon this route 261.8 miles are within the State of Missouri, and three miles are within the State of Tennessee."

A finding of the undisputed facts, herein requested by plaintiff to be found, was essential to give an accurate picture of the routes operated by the plaintiff and to indicate with fairness how much of the normal gasoline capacity of the buses is required for operations outside of the State of Arkansas.

[fol. 82] 22

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"V. In addition to the facts found by the Court in paragraph VI of his findings heretofore filed, the following: "But such buses cannot be operated from Memphis to Jonesboro and return upon 20 gallons of gasoline; or from Memphis to Blytheville and return on 20 gallons of gasoline. That while such buses can actually traverse the State of Arkansas on the route from Memphis to St. Louis without using an entire 20 gallons such 20 gallons is insufficient to carry the bus the entire distance between Memphis and Caruthersville, at which point such facilities are available. In no single instance can the buses of the plaintiff run from Memphis to their termini and return, or from Memphis to

the next gasoline storage facilities of the plaintiff, on 20 gallons of gasoline.

A finding of the undisputed facts herein requested by plaintiff was necessary to amplify and correct the Court's finding of fact No. VI.

23

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"VII. That the facts found by the Court in paragraph XII of his findings heretofore filed, be amended so as to designate the percentage of tax applied to different highway uses, as provided in the statutes, as follows:

"All net tax derived from motor vehicle under the provisions of the statutes above cited, shall be divided 92.3% shall be deemed State highway revenue, and 7.7% shall be deemed County Highway improvement revenue," and shall be expended in accordance with the provisions of said legislative enactments as set out in the Code Sec. 6604."

A finding of additional facts, as herein requested by the plaintiff was necessary in order to amplify and correct the Court's Finding of Fact No. XII; the additional facts being from the same source as those set out in the Court's own Finding.

24

The court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

[fol. 83] "VIII. In connection with the findings 13, 15, 16, 17, the Court is asked to find the following:

"Since the cost of motor fuel is one of the principal expenses in furnishing transportation and since the plaintiff operates as a certified public carrier, supervised by the State Commissions and the Interstate Commerce Commission, it is necessary to the efficient operation of the company that it should exercise diligence in purchasing gasoline as cheaply as possible and in obtaining a uniform quality and proper grade of gasoline for the effect of increasing the cost of the

motor fuel is ultimately to increase the cost of transportation furnished."

"It is impracticable from an accounting and operating point of view, to permit the casual purchase of gasoline for the use of a bus in the course of a journey.

"The filling of gasoline tanks in buses at roadside filling stations in a casual manner also constitutes a risk to the passengers on such bus, a delay in the service, incidental road failures and an inconvenience to the passengers.

"The plaintiff maintains major gasoline storage facilities at Memphis, Tennessee, and St. Louis, Missouri. Each of these cities offers water transportation and is strategically located with respect to the routes traveled by the plaintiff's buses, affording the plaintiff an opportunity to have cheaper gasoline available at convenient localities.

"While it is physically possible for the company to create and maintain gasoline storage facilities in the State of Arkansas, from an operating point of view it is uneconomical to set up such facilities at any point within such State on the lines of the plaintiff. There is no point within the State of Arkansas, on any of the routes traversed by the plaintiff within that State which offers advantages for the efficient purchase and storage of gasoline, or where the acquisition and maintenance of storage facilities would not be a useless expense and waste of money involving unnecessary duplication of facilities."

A finding of additional and undisputed facts, as herein requested by the plaintiff, was necessary to correct the errors, inaccuracies and omissions of the Court in its own Findings of Fact Nos. XIII, XIV, XVI, and XVIII.

[fol. 84] 25

The Court erred in failing and refusing to make the following additional conclusion of law, pursuant to motion of the plaintiff.

"I. There is no sufficient relation between the measure employed in fixing the amount of the tax hereunder consideration and the extent or manner of use by the plaintiff of the highways of the State of Arkansas to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses."

Such additional conclusion of law was a proper conclusion to be drawn from the undisputed facts in the record, which facts had been ignored by the Court.

26

The Court erred in failing and refusing to make the following additional conclusion of law, pursuant to motion of the plaintiff:

"II. As a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, the charge levied must be necessarily predicated upon the use made or to be made, of the highways of the state, the number of miles traveled, of the degree of wear and tear incident to such use, and cannot be arbitrary or unrelated to the amount of such use.

"The foregoing conclusions of law are based upon the recent case of Interstate Transit Company, Inc. vs. Lindsey, County Court Clerk, 283, U. S. 183, 51 Supreme Court, 380."

27

The Court erred in failing and refusing to make the following additional conclusion of law, pursuant to motion of the plaintiff:

"III. That the aforesaid acts of the State of Arkansas, as interpreted by the defendants and sought to be applied against the plaintiff, are invalid as contrary to Article I, Section 8, Clause 3 being the so-called commerce clause, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. The tax in question purporting to be a license or privilege tax, cannot be sustained as a valid license or privilege tax for the use of the highways of the State of Arkansas."

Such additional conclusion of law was a proper conclusion, and was designed to correct the erroneous conclusions arrived at by the court in its own Conclusions of Law.

[fols. 85-90] 28

The Court erred in failing and refusing to grant the motion of the plaintiff for a rehearing and oral argument of the case, and in entering a decree overruling such motion.

Wherefore, the plaintiff prays that the said decree be reversed, and that the District Court of the United States for the Eastern District of Arkansas, Western Division, be di-

rected to grant the relief prayed for in the bill, and to enter a decree accordingly.

Dated June 30, 1938.

Chandler, Shepherd, Owens & Heiskell, Barber & Henry, Attorneys for Plaintiff and Appellant, Dixie Greyhound Lines, Inc.

[File endorsement omitted.]

[fol. 91] In United States Circuit Court of Appeals, Eighth Circuit

No. 11,284—November Term, A. D. 1938

Dixie Greyhound Lines, Inc., Appellant,

vs.

Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas, Appellee

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Mr. A. L. Heiskell (Mr. J. H. Shepherd, Mr. A. L. Barber, Mr. E. A. Henry, Messrs. Chandler, Shepherd, Owen & Heiskell and Messrs. Barber & Henry were with him on the brief) for Appellant.

Mr. Louis Tarlowski, Special Counsel for the State of Arkansas (Mr. J. Hugh Wharton, Attorney for State Revenue Department of Arkansas, was with him on the brief) for Appellee.

Before Gardner, Sanborn and Van Valkenburgh, Circuit Judges

Opinion—February 25, 1939

Sanborn, Circuit Judge, delivered the opinion of the Court:

This is a suit in equity brought by the appellant, a Delaware corporation and a common carrier of passengers by bus in interstate commerce, against the Commissioner of [fol. 92] Revenue of the State of Arkansas, for an injunction against the proposed application to it of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, and Act 67 of the General Assembly of Arkansas of 1933. Act 11 provides for the imposition of a tax of 6½ cents per gallon on all gasoline sold or used in the State of

Arkansas.[1] Act 67 prohibits any person from driving into the State any motor vehicle carrying more than 20 gallons of gasoline in its fuel tank, until the tax upon the excess has been paid.[2] The court below denied an injunction and dismissed the bill of complaint.

The plaintiff in its bill alleged, and the evidence disclosed, that the Commissioner of Revenue was demanding that the appellant pay to the State, under threat of the penalties provided by law, 6½ cents on every gallon of gasoline in excess of 20 gallons which was brought into the State in the fuel tanks of its interstate busses; that the appellant was an interstate carrier by bus, was duly qualified to operate in Arkansas and other states, and was subject to regulation as to its business and rates as such carrier; that it was a large user of gasoline, the cost of which was necessarily reflected in its rates and charges; that it was necessary to the proper and economical operation of its business that it have storage facilities for gasoline outside of the State of Arkansas; that the erection of such facilities within the State would be uneconomical and wasteful; that because of the distances traversed by its interstate busses in Arkansas and because of the normal gasoline consumption of such busses (5 miles per gallon), it was impractical, inconvenient and dangerous to have such busses enter Arkansas with 20 gallons or less of gasoline in their gas tanks and to rely upon refueling such busses at roadside filling stations in Arkansas; and that, as [fol. 93] a result of the threats of the Commissioner, the appellant was placed in the position of having to adopt one of three alternatives: (1) restricting the amount of gasoline

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[1] "Section 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"'(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State.'"

[2] "Section 1. On and after the passage of this Act it shall be a violation of the law for any person, co-partnership or company to drive or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used

in the fuel tanks of interstate busses entering Arkansas to 20 gallons, thereby assuming the risk of road failures, stoppages and inconvenience, and necessitating refueling such busses at roadside points in Arkansas, with consequent delay, fire hazard, and increased cost of operation; (2) setting up in Arkansas storage facilities for gasoline, at great expense; or (3) paying the tax of 6½ cents on every gallon in excess of 20 gallons brought into Arkansas in the fuel tanks of its interstate busses, regardless of whether such excess was used in that State or not.

The practical operation of the challenged tax as applied to the appellant's business can best be shown by considering its effect upon the appellant in connection with the busses which it operates between Memphis, Tennessee, and St. Louis, Missouri, a distance of 342.7 miles. The appellant maintains storage facilities for gasoline at both of these points, where water transportation is available and gasoline can be purchased in bulk at favorable prices. The appellant pays in Tennessee the taxes imposed by the laws of that State upon the gasoline which it stores in Memphis; it pays in Missouri the taxes on its gasoline stored in St. Louis. The bus leaving Memphis for St. Louis carries in its fuel tank enough gasoline to make the entire trip to St. Louis (approximately 70 gallons). It travels three miles in Tennessee before reaching the Arkansas line. It travels through Arkansas a distance of 77.9 miles, using approximately 16 gallons of gasoline in that State. The remainder of the gasoline in the fuel tank is consumed in traveling from the Arkansas line to St. Louis, a distance of 261.8 miles, upon the highways of Missouri. In returning from St. Louis to Memphis, the bus is fueled at St. Louis. In entering Arkansas it may or may not have in excess of 20 gallons in the fuel tank, depending, of course, upon how many gallons it started with from St. Louis. Assuming that the bus, in traveling each way, had 70 gallons in its fuel tank,

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as motor fuel in said truck or motor vehicles until the state tax thereon has been paid.

"Section 2. Any person, co-partnership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one Hundred ($100) dollars. Each load carried into the state shall constitute a separate offense.

. . . . . ."

it would pay to the State of Arkansas on its trip north a tax on approximately 69 gallons of gasoline, while upon its return it would pay no tax at all, although the wear and tear upon the highways of Arkansas would be the same on each trip.

[fol. 94] The appellant does not now contend that the tax of which it complains may not be imposed by the State of Arkansas with respect to gasoline consumed or to be consumed upon the highways of Arkansas, as compensation for the use of the highways, but it does contend that that State may not impose a tax upon gasoline which is carried in interstate commerce for use in Missouri or Tennessee, because that would constitute a direct and unreasonable burden upon interstate commerce.

The tax in suit is a tax imposed for highway purposes. This is so because the revenues derived from the tax are segregated for such purposes. Moreover, the Supreme Court of Arkansas, in Sparling v. Refunding Board, 71 S. W. (2d) 182, 186, has said that the Arkansas gasoline tax is "a privilege tax, a tax on the privilege of selling and using gasoline in this state, payable at the source • • • for substantially the only available use to which it may be put, for highway travel," and (p. 186) "is not a property tax, but is a privilege tax for the use of the highways." Whether that court meant that it was a tax on all gasoline, however used, for the privilege extended to the user of the gasoline of making use of the highways of the State, or was a tax on all gasoline for the benefit of the highways, we think it is not necessary for us to determine. The decision of that court is controlling as to the meaning and extent of the requirements of the taxing act, Hicklin v. Coney, 290 U. S. 169, 172, and there can be no question that the tax is imposed for highway purposes.

Reduced to its lowest possible terms, the question for decision, we think, is whether the imposition of the tax upon gasoline carried, for use in other states, in the fuel tank of a motor vehicle traveling in interstate commerce can be sustained.

That the tax is a direct burden on interstate commerce, cannot be controverted.

If it is to be sustained at all with respect to gasoline to be used in other states, it must be sustained upon the theory that the method employed for determining the amount of the

tax constitutes a fair measure for ascertaining the compensation which lawfully may be exacted by Arkansas from the appellant for the use which it makes of the highways of the State. In Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 186, the Supreme Court said:

[fol. 95] "As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, Interstate Busses Corp. v. Blodgett, 276 U. S. 245; or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, supra [274 U. S. 554] or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland, 235 U. S. 610, 612; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252. Compare Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51. But the mere fact that the tax falls upon one who usesc the highway is not enough to give it presumptive validity."

While we can understand how the use of state highways by a carrier can be roughly measured by the amount of gasoline which that carrier uses to move its vehicles over the highways, we are unable to comprehend how the use of the highways of one state can appropriately be measured by the amount of gasoline carried in the fuel tank of an interstate carrier for use upon the highways of another state.

We think this case is ruled by Interstate Transit, Inc. v. Lindsey, supra. There the court had under consideration an Act of Tennessee which imposed a tax upon persons operating interstate motor busses on the highways of that State, which tax was graduated according to the passenger-carrying capacity of the busses. The court demonstrated that the tax was not imposed for highway purposes or as compensation for the use of the highways, but was imposed for the privilege of doing business in Tennessee. The court then considered whether the passenger-carrying capacity of a bus was a reasonable measure for determining compen-

sation for use of the highways. It said, in this connection (p. 190 of 283 U. S.):

"It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, States may tax the privilege of doing an intrastate bus business without regard to whether [fol. 96] the charge imposed represents merely a fair compensation for the use of their highways. Compare Gundling v. Chicago, 177 U. S. 183, 189. But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. Clark v. Poor, supra. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

The rule that the measure of the compensation exacted by a state from an interstate carrier for the use of its highways must have some reasonable relation to the use which that carrier makes of the highways, has not been modified or overruled. It is true that in Hicklin v. Coney, 290 U. S. 169, 173, the Supreme Court said:

"Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the 'carrying capacity' of the vehicles. The state court held that the fees 'are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensa-

tion for their use.' The statute provides for the segregation, for this purpose, of the moneys collected. See Clark v. Poor, 274 U. S. 554, 555-557. In this view the fees are not open to the objection raised in Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 186, 188. Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this [fol. 97] reason that the authority of the State to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. Morris v. Duby, 274 U. S. 135, 143; Sproles v. Binford, 286 U. S. 374, 388, 389. As the State may establish such regulations directly, the State may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity in furtherance of the same purpose. Clark v. Poor, supra."

This language we do not regard as modifying Interstate Transit, Inc. v. Lindsey, supra, which was cited with approval in Aero May Transit Co. v. Georgia Commission, 295 U. S. 285, 289; Morf v. Bingaman, 298 U. S. 407, 410; Ingels v. Morf, 300 U. S. 290, 294.

Since we can perceive no reasonable relation between the amount of gasoline carried through Arkansas in the fuel tank of an interstate bus for use in states other than Arkansas and the use which that bus makes of the highways of Arkansas, we think that the State was powerless to include such gasoline in measuring the compensation to be paid by the appellant for the use of the highways of the State.

There is, we think, another vice which inheres in this taxing statute as sought to be applied by the taxing authorities. It imposes a direct burden not only upon the interstate commerce done by the appellant in the State of Arkansas, but also upon the interstate commerce which it carries on in other states. By taxing the means whereby a bus makes a through trip from Memphis to St. Louis, the State taxes gasoline which is merely transported through Arkansas for use in interstate commerce in Missouri. The weight of the gasoline is negligible and by no stretch of the imagination can it be said to increase the wear and tear upon the highways of Arkansas. That portion of the gasoline in the fuel tanks of these interstate busses which is intended for

use and is used in states other than Arkansas is the medium whereby the appellant carries on interstate commerce in those states. To tax that medium is to directly and unjustifiably burden that commerce. Helson, et al. v. Kentucky, 279 U. S. 245, 252.

Another consideration which militates against sustaining the sort of tax which Arkansas seeks to exact from the appellant here is that that would open the door to the cumu- [fol. 98] lative taxation of the same gasoline by all states through which an interstate motor vehicle passes. If it were possible for a bus starting from New York City for Los Angeles, California, to carry enough fuel for the entire trip, it might be subjected to such a tax as is here complained of upon the contents of its fuel tank at the borders of each state through which it passed. It is our understanding that, while a state may require an interstate carrier operating within its borders to bear its proportionate share of the burden of government, it may not tax that part of the commerce which is done by that carrier in other states. Fargo v. Michigan, 121 U. S. 230; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255-257.

The decree appealed from is reversed and the court below is directed to enter a decree in favor of the appellant, enjoining the appellee from enforcing the challenged tax against it with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states.

[fol. 99] In United States Circuit Court of Appeals, Eighth Circuit

No. 11284

Dixie Greyhound Lines, Inc., Appellant,

vs.

Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas

Decree—February 27, 1939

Appeal from the District Court of the United States for the Eastern District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court appealed from, in this cause be, and the same is hereby, reversed with costs; and that the Dixie Greyhound Lines, Inc., have and recover against Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas, the sum of —— Dollars for its costs in this behalf expended, to be collected in accordance with law.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court with directions to enter a decree in favor of the appellant, Dixie Greyhound Lines, Inc., enjoining the appellee, Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas, from enforcing the challenged tax against it with respect to all gasoline in the fuel tanks of its interstate buses which is being carried through Arkansas for use in other States.

[fol. 100] In United States Circuit Court of Appeals

Petition of Appellee for Rehearing—Filed March 13, 1939

* * * * * * *

Comes the Appellee herein, and respectfully petitions the Court for a rehearing in this matter, and for cause therefor states:

That, in its opinion, this Court inadvertently overlooked the question presented by oral argument as to whether the lower court, and this Court, by the pleadings and proof, had and acquired jurisdiction to hear and determine this cause. That is to say, that the record in this case does not show, except by an allegation in the complaint and by an admission in the answer, that there is involved in this controversy a sum in excess of $3,000.00, exclusive of interest and costs; and that, when such question is considered by this Court, it will be ascertained that Plaintiff in the lower court, and appellant in this Court, has not brought itself within the protection of the Federal Court.

* * * * * * *

Respectfully submitted, J. Hugh Wharton, Attorney for State Revenue Department of Arkansas; Louis Tarlowski, Special Counsel for the State of Arkansas, Attorneys for Appellee.

[fol. 101] CERTIFICATE OF COUNSEL

I, Louis Tarlowski, of counsel for Appellee in the foregoing cause, do hereby certify that the foregoing Petition for Rehearing is filed in good faith, and is believed to be meritorious, and is not filed for the purpose of vexation or delay.

Louis Tarlowski.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—March 21, 1939

The petition for rehearing filed by counsel for appellee in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

[fol. 102] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF APPELLEE FOR APPEAL TO SUPREME COURT, U. S. —Filed May 13, 1939

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Circuit:

Your petitioner, the above named Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, respectfully shows.

On the 25th day of February, 1939, the court filed its opinion in this cause holding Act 11 of the Special Session of the General Assembly of Arkansas for 1934, page 28, and Act 67 of the General Assembly of Arkansas for 1933, page 194, invalid because in violation of the Commerce Clause of the Constitution of the United States, Article 1, Section 8, Clause 3; and ordered the entry of a decree, the effect of which is to prevent your petitioner from enforcing said statutes against Dixie Greyhound Lines, Inc., the above named appellant.

Your petitioner further respectfully states that said final decree is erroneous and is greatly to the prejudice and injury of your petitioner. The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors and prayer for reversal filed in the office of the Clerk of this Court, and presented here-

with, pursuant to Rule 9 of the Rules of the Supreme Court of the United States.

There has likewise been filed in the Clerk's office, and there is presented herewith, a statement as to the jurisdiction of the Supreme Court of the United States on appeal as provided by Rule 12 of the Rules of the Supreme Court of the United States.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors [fol. 103] complained of, your petitioner prays for the allowance of an appeal in this cause from the said holding and decision of this Court to the Supreme Court of the United States, agreeably to the Statutes and Rules of the Supreme Court of the United States in such cases made and provided.

Your petitioner further prays for citation as provided by law and Rule 10 of the Rules of the Supreme Court of the United States, directed to the above named Dixie Greyhound Lines, Inc.

Frank Pace, Jr., Louis Tarlowski, Attorney for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, the Above Named Petitioner.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ASSIGNMENT OF ERRORS ON APPEAL TO SUPREME COURT, U. S. —Filed May 13, 1939

The above named Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, at the time of filing and presenting his petition for appeal to the Supreme Court of the United States from the decision entered against him in this cause by the United States Circuit Court of Appeals, Eighth Circuit, on the 25th day of February, 1939, and from the order of said court overruling his petition for a rehearing, files and presents to said court the following assignment of errors upon which he will rely in said appeal:

1

The court erred in holding that Act 67 of the General [fol. 104] Assembly of Arkansas of 1933, page 194, violates the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States.

2

The court erred in holding that said Act 67 of the General Assembly of Arkansas of 1933, page 194, and Section 22 of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, page 28, violate the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States, or the Fourteenth Amendment to the Constitution.

3

The court erred in holding said acts unconstitutional, because the evidence shows (a) that on some of the company's routes the busses can be and are operated during the entire time while in Arkansas on less than twenty gallons of gasoline, and (b) that on all of the routes said busses can be so operated that all of the gasoline in the fuel tanks in excess of twenty gallons at the time the busses enter Arkansas will be consumed in Arkansas.

4

The court erred in holding that inconvenience which may be suffered by Dixie Greyhound Lines, Inc., in complying with said acts affords a sufficient ground for declaring said acts unconstitutional.

5

The court erred in holding said acts unconstitutional, because said acts afford a necessary and practical and valid means of collecting the gasoline tax from interstate motor vehicle operators using the state's highways.

[fols. 105-122]

6

The court erred in holding said acts unconstitutional, because in their practical operation they do not necessarily require a motor vehicle operator to pay a tax upon gasoline he uses in another state.

7

The court erred in holding that because of the plan of carrying on its business adopted by Dixie Greyhound Lines, Inc., said acts are unconstitutional.

8

The court erred in holding said acts unconstitutional on the ground that they impose a tax upon gasoline used in other states.

9

The court erred in holding that said acts impose an unconstitutional burden upon interstate commerce.

10

The court erred in holding that the fact that the acts may require a motor vehicle operator to pay to Arkansas the Arkansas tax upon gasoline which such operator uses in another state renders the acts unconstitutional.

Wherefore, the said Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, prays that the decision and judgment of the Circuit Court of Appeals of the Eighth Circuit be reversed, that said acts be declared constitutional, and that the decree of the District Court be affirmed.

Frank Pace, Jr., Louis Tarlowski, Attorneys for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas.

[fol. 123] In United States Circuit Court of Appeals

Order Allowing Appeal to the Supreme Court, U. S.—Filed May 13, 1939

The petition of Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, for an appeal in the above entitled cause to the Supreme Court of the United States from the decision of this Court in the above entitled cause filed February 25, 1939, having been filed herein, accompanied by an assignment of errors and a statement as to jurisdiction of the Supreme Court of the United States, as provided by the Rules of the Supreme Court of the United States, and the said papers having been presented to the undersigned Judge, and the record in this cause having been considered;

It is hereby ordered, that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the decision of this Court filed in this cause on February 25, 1939, and the order of this Court overruling the petition for a rehearing filed by this petitioner, and that the Clerk of this Court shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the Court, a true copy of the

material parts of the record herein to be designated as provided by the Rules of the Supreme Court of the United States.

It is further ordered, that citation issue to Dixie Greyhound Lines, Inc., as provided by law and the Rules of the Supreme Court.

It is further ordered, that the said Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, file security for costs in the penal sum of $250.

It is further ordered that until this appeal is finally deter- [fols. 124-126] mined no mandate shall issue from this Court.

Done and entered this 13th day of May, 1939.

John B. Sanborn, Judge of the United States Circuit Court of Appeals, Eighth Circuit.

[File endorsement omitted.]

[fol. 127] IN UNITED STATES CIRCUIT COURT OF APPEALS

PRAECIPE FOR TRANSCRIPT ON APPEAL TO SUPREME COURT, U. S.—Filed May 26, 1939

To the Clerk of the United States Circuit Court of Appeals, Eighth Circuit:

For the purpose of the record on appeal in the above entitled cause, please prepare, certify and transmit to the clerk of the Supreme Court of the United States a transcript of the following from the files and records of your Court in said cause:

(1) The entire printed transcript of record.

(2) The decision and opinion of your Court filed February 25, 1939.

(3) The following, only, from the printed "Petition for Rehearing and Brief Thereon" filed by attorneys for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas:

The petition for rehearing on page 2, and the signatures of counsel and certificate of counsel on page 11.

(4) Order denying petition for rehearing.

(5) Petition for appeal to Supreme Court of the United States.

(6) Assignment of Errors and prayer for reversal filed May 13, 1939.

[fols. 128-131] (7) Statement as to jurisdiction of the Supreme Court of the United States.

(8) Order allowing appeal to the Supreme Court of the United States.

(9) Citation signed by Judge Sanborn on May 13, 1939, with proof of service.

(10) Notice pursuant to paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States, and proof of service upon Dixie Greyhound Lines, Inc., of copies of the petition for appeal, assignment of errors, statement as to jurisdiction, and order allowing appeal.

(11) Cost bond on appeal to Supreme Court.

(12) This praecipe.

Dated this 14 day of May, 1939.

Frank Pace, Jr., Louis Tarlowski, Attorneys for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas.

Service of the foregoing praecipe for transcript of the record on appeal and receipt of copy thereof acknowledged this 19 day of May, 1939.

Dixie Greyhound Lines, Inc., By Chandler, Shepherd, Owen & Heiskell, Its Attorneys.

[File endorsement omitted.]

[fol. 132] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Order Enlarging Time to Docket Appeal

The time within which the appeal and record on appeal in the above entitled case may be docketed in the Supreme

Court of the United States is hereby enlarged to and including the 3rd day of July, 1939.

Dated June 22, 1939.

John B. Sanborn, U. S. Circuit Judge.

[fol. 132½] [File endorsement omitted.]

[fol. 133] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON BY APPELLANT, AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED.—Filed July 7, 1939

The appellant above named, in compliance with paragraph 9 of Rule 13 of the Rules of the Supreme Court, does now make and file the following statement:

I

The points to be relied upon by appellant are the assignments of error filed by him in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in this cause, and which are included in the transcript of record on appeal in this cause filed or to be filed in the office of the Clerk of the Supreme Court of the United States.

[fol. 134]

II

The parts of the record necessary for the consideration of said points and which should be printed are:

(1) The following parts of the printed "Transcript of Record" from the Circuit Court of Appeals which was filed and used as the printed record in the Circuit Court of Appeals:

(a) Bill of Complaint, pages 1-12, and filing endorsement on page 13.

(b) Amendment to original bill of complaint, pages 14-15.

(c) Motion to dismiss and answer of defendant, pp. 15-22.

(d) Order substituting Z. M. McCarroll, Commissioner of Revenues, etc., as defendant in the place of Earl Wiseman, printing only, however, the name of the Court on page 25, the order commencing with the fifth line from the foot

of page 25 to and including the signature of the District Judge on page 26, and the filing endorsement.

(e) Stipulation relating to application for preliminary injunction, etc., page 26.

(f) Findings of fact and conclusions of law of the District Court, pages 36-40.

(g) Opinion of the District Court, pages 41-44.

(h) Decree, pages 54-55.

(i) Abstract of testimony, pages 62-71, to and including order of District Judge on page 71, and filing endorsement.

(j) Assignment of errors, pages 74-85.

(2) Decision of the United States Circuit Court of Appeals for the Eighth Circuit.

(3) Petition of Z. M. McCarroll, Commissioner, etc., for rehearing.

[fol. 135] (4) Order denying petition for rehearing.

(5) Petition for appeal to Supreme Court.

(6) Assignment of errors and prayer for reversal.

(7) Order allowing appeal to Supreme Court of the United States.

(8) Praecipe for transcript of the record from the Circuit Court of Appeals.

(9) The foregoing statement of points to be relied upon and designation of the parts of the record to be printed.

(10) Order enlarging time to docket appeal.

Dated this 5th day of July, 1939.

Frank Pace, Jr., Amos M. Matthews, Attorneys for Appellant.

Service of the foregoing statement of the points to be relied upon by Appellant, and designation of the parts of the record to be printed, and receipt of copy thereof, acknowledged this 3rd day of July, 1939.

Chandler, Shepherd, Owen & Heiskell, Attorneys for Appellee.

[fol. 136] [File endorsement omitted.]

[fol. 137] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION BY APPELLEE OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED—Filed July 22, 1939

The appellee above named, in compliance with paragraph 9, of Rule 13 of the Rules of the Supreme Court, hereby designates to be printed the following portions of the record, in addition to those parts of such record heretofore designated by the appellant:

(1) The following parts of the printed "Transcript of Record" from the Circuit Court of Appeals for the Eighth Circuit, which was filed and used as the printed record in the Circuit Court of Appeals:

(a) Petition of plaintiff for rehearing and for oral argument, pages 44 through 49, and filing endorsement on page 50. Here insert (in lieu of recopying such petition as later filed in identical terms—Record pages 55-60) the following: "Refiled in identical terms on April 22, 1938."

[fol. 138] (b) Motion of plaintiff for additional findings of fact and conclusions of law, pages 50 through 54, and filing endorsement on page 54.

(c) Order overruling petition for rehearing and motion for additional findings of fact and conclusions of law, pages 60 through 61, and filing endorsement on page 61.

Dated this 6th day of July, 1939.

Walter Chandler, J. H. Shepherd, A. L. Heiskell, Chandler, Shepherd, Owen & Heiskell, Attorneys for Appellee.

Service of the foregoing designation of parts of the record to be printed, and receipt of copy thereof, acknowledged this 6th day of July, 1939.

Frank Pace, Jr., Attorney for Appellant.

[fol. 139] [File endorsement omitted.]

Endorsed on cover: File No. 43,545. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 138. Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, Appellant, vs. Dixie Greyhound Lines, Inc. Filed June 26, 1939. Term No. 138, O. T., 1939.